91-866

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. _____

ROBERT M. ADAMS, ET AL.,

PETITIONERS,

v.

LTV STEEL MINING COMPANY, ORE MINING COMPANIES PENSION PLAN AND PENSION COMMITTEE, ORE MINING COMPANIES PENSION PLAN,

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Stanley Efron, #25859
Counsel of Record for Petitioners
Henson & Efron, P.A.
1200 Title Insurance Building
Minneapolis, Minnesota 55401
(612) 339-2500

QUESTION PRESENTED FOR REVIEW

Under ERISA where a pension plan contains a provision expressly giving the employer-fiduciary the right to determine from time to time if its best interest is served by allowing a specific early retirement benefit which is based on a combination of years of service and age, may the employer-fiduciary, after enactment of the Retirement Equity Act of 1984, prevent an otherwise eligible employee from enjoyment of that benefit by simply determining not to make it available to a particular group of employees.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.....	1
TABLE OF AUTHORITIES.....	3
OPINIONS BELOW.....	4
JURISDICTION.....	4
STATEMENT.....	4
REASONS FOR GRANTING THE PETITION...	15

Additional Petitioners not named in caption are:

EDWARD A. ALTO, PAUL O. ARNSON, ALLAN L. DECENT, DONALD J. FORTE, DONALD C. FOSTER, LOUIS T. GAMBUCCI, JOSEPH L. GILLILAND, WAYNE M. GUNDERSON, MARLYN R. GRUNWALD, MELVIN L. HALLIDAY, GEORGE J. HILL, LEONARD W. HOTAKAINEN, RAYMOND R. HOTAKAINEN, MARK D. JACKSON, WALTER E. JOHNSON, ROBERT J. JORGENSON, ROBERT KAROLEVITZ, DANIEL J. KEDROWSKI, EUGENE F. KEDROWSKI, ROBERT A. KLUNE, GARY L. KOPP, JOHN E. KOVATOVICH, LAWRENCE J. LENK, ROBERT V. MAGNUSON, CLIFFORD D. MANN, CARLYLE J. MATHSON, LEO L. MATTESON, MILNE C. MILTZ, DONALD T. MOGEN, JOHN V. MONSON, ALDEN MONSRUD, DALE K. OLSON, PAUL PALO, DAVID E. PATROW, EUGENE P. PETERSON, PAUL P. PLESHA, LARRY POWELL, NORMAN T. PRATT, WILLIAM A. PROUT, ROBERT W. PULKINEN, DWIGHT F. ROBISON, ARNOLD M. RUDOLPH, ALLAN E. SCOTT, WESLEY E. SHOSTEDT, LEONARD L. SOUDER, LEO J. SVIR, DAVID G. SWENSON, LAWRENCE TAHIJA, ANTHONY R. TURK, DONALD A. TYSSEDAL, DONALD R. VEEDER

With respect to LTV Steel Mining Co. (formerly known as Erie Mining Company), its parent company is LTV Steel Co. The managing agent for LTV Steel Mining Co. is Pickand-Mathers & Co.

TABLE OF AUTHORITIES

	Page	Appendix Page
Statutory Provisions Involved:		
28 U.S.C. § 1254(1).....	4	
29 U.S.C. §§ 141, 158...	5	00087, 00089
29 U.S.C. § 1001-1461...	5	00090
29 U.S.C. § 1002(2).....	6	00095
29 U.S.C. § 1002(5).....	6	00097
29 U.S.C. § 1002(16)(A).	7	00098
29 U.S.C. § 1002(16)(B).	6	00098
29 U.S.C. § 1054(g) (Internal Revenue Code § 411(d)-6).....	15, 16, 18, 20	00100
29 U.S.C. § 1054(g)(2)..	15, 20	00100
29 U.S.C. § 1104(a)(1)..	5	00102
29 U.S.C. § 1140.....	5	00104
Treas. Reg. § 1.411(d)-4	16, 17	00106

	Page
U.S. Supreme Court Case:	
Firestone v. Bruch, 109 S.Ct. 948 (1989).....	18
Other Federal Cases:	
Berger v. Edgewater Steel Co., 911 F.2d 911 (3rd Cir. 1990), cert. den. 111 S.Ct. 1310 (1991).....	18, 25 26, 27
Dockray v. Phelps Dodge, 801 F.2d 1149 (9th Cir. 1986).....	18
Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir.), cert. den. 110 S.Ct. 281 (1989).....	17, 18, 25
Gavalik v. Continental Can Co., 812 F.2d 834 (3rd Cir. 1987), cert. den. 484 U.S. 979, 108 S.Ct. 495.....	21, 22, 23, 26, 27
Hickman v. Tosco, 840 F.2d 564 (8th Cir. 1988).....	17
Hlinka v. Bethlehem Steel, 863 F.2d 289 (3rd Cir. 1988).....	24, 25
Hozier v. Midwest Fasteners, 908 F.2d 1155 (3rd Cir. 1990).....	26
U.S.E.E.O.C. v. County of Calumet, 686 F.2d 1249 (7th Cir. 1982)...	23

The Petitioners respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (A00001-00011) is reported at 936 F.2d 368. The Order and Opinion of the District Court (A00012-00082) is unreported.

JURISDICTION

The judgment of the Court of Appeals (A00083-00085) was entered on June 13, 1991. Petition for Rehearing was denied on July 26, 1991 (A00086). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners brought an action in the United States District Court for the District of Minnesota claiming that they were improperly denied an early retirement benefit under section 2.6(d) of their pension plan, in violation of both the

Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001-1461 and the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 141, 158.

Petitioners moved for partial summary judgment in the District Court on the issue of breach of fiduciary duties under 29 U.S.C. § 1104(a)(1) and unlawful discrimination under 29 U.S.C. § 1140. Defendants cross-moved on those issues but also moved for summary judgment on the remaining claims relating to ERISA and LMRA; petitioners did not join in those motions and opposed them on both disputed facts and legal grounds.

The District Court denied the motion of petitioners and granted the motion and cross-motion of the defendants. The Eighth Circuit Court of Appeals affirmed the District Court in all respects in its Opinion dated June 13, 1991, and denied rehearing on July 26, 1991.

Petitioners were mining employees for LTV Steel Mining Company ("LTV") and participants in the Ore Mining Companies Pension Plan ("plan"). Some petitioners have retired under plan provisions (other than the early retirement provision in question) since this action was commenced and some have not made application for such early retirement but claim they are entitled thereto because it was eliminated as a benefit while they were participants in the plan. Petitioners were also bargaining unit members of the United Steel Workers of America ("union") local 4108.

LTV is the "employer" and "plan sponsor" with respect to the plan within the meaning of 29 U.S.C. § 1002(5) and § 1002(16)(B).

The plan is an "employee pension benefit plan" or a "pension plan" within the meaning of 29 U.S.C. § 1002(2) and is administered by a pension Committee

("Committee"). The Committee is an administrator of the plan within the meaning of 29 U.S.C. § 1002(16)(A). During all times in question the Committee had only two members, the employer's manager for employee benefits and its vice president for operations. The Committee is responsible for processing pension applications under section 8.2(h) of the plan.

Until April 1, 1986, all salaried and hourly employees participated in the plan. Effective April 1, 1986, salaried employees began to participate in a separate defined contribution plan but those salaried employees already in the plan retained a frozen benefit in the plan.

The 70/80 pension benefit in question is an early retirement benefit available to employees meeting a combination of age and years of service requirements. The relevant provisions are contained in section 2.6 of the plan, which has four

options in subparagraphs (a), (b), (c), and (d). Subparagraphs (a), (b), and (c) deal with early retirement where there has been a break in continuous service by reason of a permanent shutdown, layoff resulting from a permanent shutdown or a layoff where return to work is declared unlikely by the employer or a layoff under a permanent shutdown and acceptance of a job with another employing company. Only section 2.6(d) makes no reference to breaks in continuous service or permanent shutdowns; it simply says that an employee may apply if he considers it would be in his interest to retire, his employer considers that such retirement would be in its interest, and "...by applying like rules in a nondiscriminatory manner to like or similar circumstances, approves an application for retirement under mutually satisfactory conditions...". This benefit is attractive to employees because with less than 30 years' service it provides

for a pension benefit not actuarially reduced and there is a $400 monthly supplement until attaining age 62. Neither the Committee nor the employer published any rules governing applications under section 2.6(d).

During the years 1982 through April 1, 1986, 70/80 under section 2.6(d) was used by the employer to reduce the salaried work force because of depressed conditions in the industry. Management made the determination who was to be selected, evaluated the costs, and approved or rejected the proposed employee. If approved, the employee would be informed that a 70/80 retirement was available and was actively encouraged to accept the offer. An employee was purportedly free to reject the offer, but some who refused were demoted instead. During the 1982-86 period, there were a number of initiatives aimed at reducing the salaried work force. Some employees

who had previously turned down an offer were solicited more than once and other employees who were not initially targeted for retirement applied for and were subsequently awarded a 70/80 pension. Of the approximate 100 salaried employees who formally submitted written applications for 70/80 retirement, none were rejected by the Committee.

During 1982 through 1986, the average hourly work force was also reduced. It went from a high of 1,641 in January, 1982, to as few as 34 through January, 1986. After June, 1982, not less than 527 hourly workers were in permanent layoff for over five years. While management claimed that after the summer of 1986 it increased production to maximum operating levels which required all laid off hourly employees to be returned, the "average manpower listing" through 1987 shows that the bargaining unit employees never exceeded 1,114.

Before petitioners made formal application for their 70/80 benefits in 1987, management had determined (but not announced to the work force) that 70/80 retirements under paragraph 2.6(d) would not be available to the hourly work force because it was cheaper to lay off younger hourly employees (pursuant to seniority) than to provide retirement incentives to older employees eligible for early retirement. While it would have been cheaper to similarly lay off salaried employees during 1982 through 1986, it was not done because management claimed that it wanted to retain the more technically qualified younger salaried people.

In 1987, provision was made for two hourly workers to receive 70/80 retirement benefits under section 2.6(d). These offers were made as part of negotiated agreements with the union in exchange for consenting to a change in the method of delivery of drinking water to field em-

ployees (February, 1987), and the creation of a new classification of utility equipment operator (April, 1987) who would be paid a lower rate than a shovel operator but a greater rate than a tractor operator. Neither agreement of February, 1987, or of April, 1987, specifically addressed a permanent reduction in the work force. The two hourly workers so approved for section 2.6(d) early retirement had not made written application before being selected and were not part of the group of petitioners.

Of the 55 petitioners, 47 formally submitted applications for a 70/80 benefit during 1987--some of them on two occasions. All applications were rejected.

Of the remaining eight petitioners, one did not submit a written application because he had already retired in 1986. The seven other petitioners did not submit written applications during 1987 because they did not have the requisite age and

years of service to qualify for 70/80 at that time. Their only challenge here is to the elimination of the 70/80 provisions from the plan.

Of the 47 petitioners who submitted written applications during 1987, 20% were not eligible until 1987. Of those who had been eligible prior to 1987, including the one who retired in 1986, many of them had been led to believe by management that a 70/80 pension was only in a separate plan for salaried workers and was simply unavailable to the hourly work force.

The event triggering petitioners' formal written applications in 1987 was that one petitioner had learned in 1986 that the 70/80 provisions in the plan did in fact cover both salaried and hourly workers, despite his being led to believe otherwise.

Because of the prior decision by management that they were not going to give any mutual 70/80 retirement to hourly

workers, the applications were summarily rejected by management and the Committee. The Committee did not review the basis for the management decision. Its only role was the signing of the denial letter. No specific reasons for denial were set forth in the denial letters.

The petitioners whose applications were denied then promptly filed a grievance with the union, which declined to pursue the grievance.

Management claimed that the long-term financial health of the plan could be adversely impacted by approving the applications, but conceded that the costs were not evaluated at the time the applications were submitted; and the plan was then overfunded by approximately $39.5 million.

REASONS FOR GRANTING THE PETITION

I.

The Court of Appeals decision below effectively emasculates the provisions of the Retirement Equity Act of 1984, 29 U.S.C. § 1054(g)(2) (REA).

As to benefits provided under a plan, the anti-cutback rule under 29 U.S.C. § 1054(g) was designed to prevent formal or informal plan amendment so as to eliminate or reduce existing benefits. REA amended the rule by providing explicitly, for the first time, that the elimination or reduction of an early retirement benefit amounts to reducing an accrued benefit. The (restated) plan in this case was adopted on April 1, 1986, and REA was enacted in 1984. Thus, when the restated plan was adopted, the employer was on notice that an early retirement benefit, such as the one provided under section 2.6(d) of this plan, was

treated as an accrued (or protected) benefit.

The Internal Revenue Service, along with the Department of Labor, has joint jurisdiction of the administration of the plan. Under Treas. Reg. § 1.411(d)-4, it is provided in Q&A-4 that a plan which permits the employer, directly or indirectly through the exercise of discretion, to deny a participant a protected benefit for which the participant is otherwise eligible "but for the employer's exercise of discretion" violates the requirements of Code § 411(d)-6, 29 U.S.C. § 1054(g). Nevertheless, the Court of Appeals effectively ignored this provision in its Opinion, as follows:

A. At 936 F.2d 369, it points out that the employer had adopted a policy of denying early retirement to all hourly employees under section 2.6(d) unless the union agreed to a corresponding permanent reduction in the number of hourly jobs,

and thus (at 936 F.2d 370) "early retirement was not in the company's interest." These early retirement denials were made in 1987, and at that date clearly failed to meet the requirements of Treas. Reg. § 1.411(d)-4.[1]

B. At 936 F.2d 370, the Court of Appeals stated that in its "dual capacity" as employer, even though it was also a fiduciary, the employer could, for business reasons, eliminate "contingent employee benefits."[2] The issue is not

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[1] The court also said (936 F.2d at 370): "Later, after Congress enacted the Retirement Equity Act of 1984...LTV and the union agreed to amend the plan to eliminate subsection 2.6(d)." This is a misstatement of fact. REA was enacted two years before the first early retirement applications were made, the restated plan was adopted in 1986 after REA was enacted, and the agreement for the amendment to the restated plan to eliminate subsection 2.6(d) did not take place until long after the applications had been made and rejected.

[2] Hickman v. Tosco, 840 F.2d 564 (8th Cir. 1988) described the dual capacity doctrine but the facts involved a discharge, not an application for retirement. Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir.), cert. den. 110 S.Ct. 281 (1989) is also a quite different fact situation: a single employee terminated for cause who then applied for early retirement. Neither Hickman nor

(footnote continued)

whether it is a contingent benefit but whether (particularly since REA was enacted) it was a protected benefit.

Dockray v. Phelps Dodge, 801 F.2d 1149 (9th Cir. 1986), which was decided under the "arbitrary and capricious" standard (pre-Firestone v. Bruch, 109 S.Ct. 948 (1989)), nevertheless found that eligibility for 70/80 early retirement is a fiduciary decision, not an employer decision, and that substantial deference is not granted to a decision of a management plan administrator.

(footnote continued from previous page)
Dzinglski was decided on post-REA facts. Berger v. Edgewater Steel Co., 911 F.2d 911 (3rd Cir. 1990), cert. den. 111 S.Ct. 1310 (1991), was a post-REA case, but it based its decision on pre-REA cases and did not even mention the applicable Treasury Regulations issued under Internal Revenue Code § 411(d)-6 (29 U.S.C. § 1054(g)).

It should also be noted that at 936 F.2d 370 the Court of Appeals says that the pension committee did not breach its fiduciary duties in denying the applications because it had no authority to override the employer's business decision. The plan is to the contrary, however. Section 8.2(h) of the plan grants to the Committee the exclusive authority to grant or deny benefits. When the Employer adopted this restated plan in 1986 it had an ample opportunity to say otherwise.

C. The Court of Appeals said (936 F.2d at 370) that the employer did not violate ERISA when adopting the policy of denying early retirement without a permanent reduction in the work force; and the policy was not an amendment but merely a guideline used to decide whether early retirement was in the employer's interest. It is undisputed, however, that the employer did not apply this as a "guideline": (a) the employer made the decision that it was not going to grant hourly workers early retirement under subsection 2.6(d) even though it was willing to grant it to salaried workers; and (b) at some point in time it dressed this up by saying that it had to be accompanied by a permanent reduction in the work force, but the evidence presented with respect to the only two hourly early retirements granted did not support that they were accompanied by such a permanent reduction.[3]

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[3] The evidence, which consisted of two agreements
(footnote continued)

D. Then the Court below (936 F.2d at 371) states that while an employer "cannot decrease a participant's accrued benefit by amending a pension plan...", here the employees could not have an accrued benefit because they "have not satisfied the pre-amendment condition that their early retirement be in [the employer's] interest." That simply ignores the Treasury Regulations issued under Internal Revenue Code § 411(d)-6. Indeed, if an employer can, in its sole and absolute discretion, prevent a condition to qualify for early retirement from occurring, the employees can never satisfy that condition. The whole purpose of 29 U.S.C. § 1054(g)(2) was to provide that an employer could not through unfettered discretion reduce such

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(footnote continued from previous page)
between the local union and the employer, says nothing whatsoever about a permanent reduction in the work force, although it does speak to changes in the work rules. Nothing in § 2.6(d) of the plan itself ever addressed (a) denying early retirement if it was not accompanied by a permanent reduction in the work force or (b) denying early retirement generally to hourly workers.

protected early retirement benefits. The Court of Appeals has effectively repealed this protective statute by its circular argument.

II.

There was purposeful interference on the part of the employer in preventing the hourly employees from achieving early retirement under subsection 2.6(d).

Here, again, the Court of Appeals uses its circular argument to state that an employee could never become entitled to the early retirement and therefore no discrimination could exist. As in Gavalik v. Continental Can Co., 812 F.2d 834 (3rd Cir. 1987), cert. den. 484 U.S. 979, 108 S.Ct. 495 (1987), the employer, facing a decline in business, systematically set out to cut down on pension benefits and costs to prevent eligibility for 70/80 pension benefits. In Gavalik the Court of Appeals said that the employer's program to avoid liability for early retirement

benefits violated ERISA and it remanded for appropriate relief. In remanding, it made the point that if the employer's program was not direct proof of discrimination under § 510, "We are hard pressed to imagine a set of facts that would" (812 F.2d at 856). It also pointed out that the employer devised the scheme solely to avoid future benefits using layoffs and reduction of volume. Here the employer admitted it treated the hourly and salaried workers differently because of the potential costs to it in future and current benefits. And it put into permanent layoff hourly employees who could not achieve eligibility under § 2.6(d) while it kept those so eligible on a callback/layoff cycle designed to prevent them from claiming non-discretionary early retirement under §§ 2.6(a), (b) or (c).

It is clear from the opinion below that not only did the Court of Appeals believe that eliminating early retirement

benefits through employer discretion was not prohibited conduct, but it also came to a factual conclusion that the actions of the employer were not "purposeful interference."[4]

III.

The employer may not claim the right to deny discretionary benefits arbitrarily.

At 936 F.2d 370-371, it is stated by the Court of Appeals that "The employees basically complain subsection 2.6(d) is unfair because it allows [the employer] to decide unilaterally that early retirement is not in the company's interest...In the absence of any showing of bad faith, we decline to deny [the employer] of its

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[4] Here, again, the Court of Appeals indicated that the two early retirements allowed hourly employees, in agreement with the local union, somehow eliminated the discrimination argument. It is fairly clear that nothing that is agreed upon between the employer and the union overrides ERISA. Compare U.S.E.E.O.C. v. County of Calumet, 686 F.2d 1249 (7th Cir. 1982). Nothing in ERISA provides an exemption for collective bargaining. In Gavalik, cited above, it is noted that the union participated in fashioning the employer's scheme to cut benefits.

power to decide whether early retirement is in the company's interest." The Court of Appeals characterizes this as a complaint of unfairness or bad faith. It is neither: at least since REA was enacted, the "complaint" is that the employer is prohibited from unilaterally deciding that early retirement is not in its best interest. That amounts to a decision made solely in the discretion of the employer with respect to a benefit which is clearly protected under REA. Notwithstanding the cases cited by the Court below, if REA does not protect against this type of action, it gives no protection at all.

Judge Becker, in his concurring opinion in Hlinka v. Bethlehem Steel, at 863 F.2d 289, stated that the words in section 2.6(d) of the employer's plan are not satisfied by the employer's mere declaration that early retirement is not "in its interest." In addition, unlike that in Hlinka, this plan required under

section 2.6(d) that approval for early retirement would be "by applying like rules in a nondiscriminatory manner to like or similar circumstances"; no rules, however, were ever adopted.

Berger v. Edgewater Steel Company, 911 F.2d 911 (3rd Cir. 1990) cert. den. 111 S.Ct. 1310 (1991), is apparently regarded below as the controlling case. Berger cites Hlinka[5] and Dzinglski,[6] both of which dealt with an individual who was either discharged or "unique" and both of which had plans different from the employer's plan in this case. As distinguished from the facts at hand, Berger at page 919 states "The plan itself did not give fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Among

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[5] 863 F.2d 289 (3rd Cir. 1988).

[6] Dzinglski v. Weirton Steel Corp., 875 F.2d 1079 (4th Cir. 1989) cert. den. 110 S.Ct. 281 (1989), was not a post-REA case; and it involved a single employee terminated for cause who then applied for early retirement.

other factual matters which appeared to be important in the Berger decision was that there was no evidence of bad faith by the employer.[7] Berger states, at pages 919-920, "We express no opinion on whether a blanket refusal of benefits will be proper absent these facts." Judge Sloviter, in his dissenting opinion in Berger said, at pages 925-928, that the employer effectively nullified the 70/80 plan benefit, thus effectively amending the plan, that oral modifications to the plan to either increase or decrease benefits are prohibited[8], that employees were entitled to individual consideration of their applications, that on a summary judgment motion any doubt as to existence of a genuine issue should be resolved against the

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[7] Here there was ample evidence of bad faith (as in the Gavalik case), involving the use of pension funds to reduce the salaried workers but not to reduce the hourly workers unless some bargain could be struck with the local union, and using permanent layoff for younger workers but not those eligible for early retirement.

[8] See Hozier v. Midwest Fasteners, 908 F.2d 1155 (3rd Cir. 1990).

moving party, and that allowing the employer to amend its plan by an unwritten policy is inconsistent with ERISA.

We are of the view that the correct applications of ERISA and REA are in the Third Circuit's Gavalik decision and the dissenting opinion of Circuit Judge Sloviter in Berger, and that the decision below of the Eighth Circuit Court of Appeals rests on an interpretation of ERISA which is essentially pre-REA and which gives a license to employers never intended under ERISA.

CONCLUSION

In the circumstances of this case, the Retirement Equity Act of 1984 provides protection for the 70/80 early retirement benefit, and the employer-fiduciary may not, in its sole discretion, deny such benefit to an otherwise eligible employee or class of employees. Accordingly, this

Petition for Certiorari should be granted.

Dated: October 23, 1991.

Stanley Efron, #25859
Counsel of Record for
Petitioners
Henson & Efron, P.A.
1200 Title Insurance Building
Minneapolis, Minnesota 55401
(612) 339-2500

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Stanley Efron, #25859
Counsel of Record for Petitioners
Henson & Efron, P.A.
1200 Title Insurance Building
Minneapolis, Minnesota 55401
(612) 339-2500

APPENDIX TABLE OF CONTENTS

	Appendix Page
Opinion of Court of Appeals...	00001
Order and Opinion of District Court.....	00012
Judgment of Court of Appeals..	00083
Order Denying Petition for Rehearing.....	00086
Statutory Provisions:	
29 U.S.C. §§ 141, 158.....	00087
29 U.S.C. § 1001-1461.....	00090
29 U.S.C. § 1002(2).....	00095
29 U.S.C. § 1002(5).....	00097
29 U.S.C. § 1002(16)(A).....	00098
29 U.S.C. § 1002(16)(B).....	00098
29 U.S.C. § 1054(g) (Internal Revenue Code § 411(d)-6)....	00100
29 U.S.C. § 1054(g)(2).....	00100
29 U.S.C. § 1104(a)(1).....	00102
29 U.S.C. § 1140.....	00104
Treas. Reg. § 1.411(d)-4.....	00106

United Stated Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-5102MN

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WAYNE M. GUNDERSON,	*	
MARLYN R. GRUNWALD,	*	
MELVIN L. HALLIDAY,	*	
GEORGE J. HILL,	*	Appeal from
LEONARD W. HOTAKAINEN,	*	the United
RAYMOND R. HOTAKAINEN,	*	States District
MARK D. JACKSON,	*	Court for the
WALTER E. JOHNSON,	*	District of
ROBERT J. JORGENSON,	*	Minnesota.
ROBERT KAROLEVITZ,	*	
DANIEL J. KEDROWSKI,	*	
EUGENE F. KEDROWSKI,	*	
ROBERT A. KLUNE,	*	
GARY L. KOPP,	*	
JOHN E. KOVATOVICH,	*	
LAWRENCE J. LENK,	*	
ROBERT V. MAGNUSON,	*	
CLIFFORD D. MANN,	*	
CARLYLE J. MATHSON,	*	
LEO L. MATTESON,	*	
MILNE C. MILTZ,	*	
DONALD T. MOGEN,	*	
JOHN V. MONSON,	*	
ALDEN MONSRUD,	*	
DALE K. OLSON,	*	
PAUL PALO,	*	
DAVID E. PATROW,	*	
EUGENE P. PETERSON,	*	
PAUL P. PLESHA,	*	

LARRY POWELL,	*
NORMAN T. PRATT,	*
WILLIAM A. PROUT,	*
ROBERT W. PULKINEN,	*
DWIGHT F. ROBISON,	*
ARNOLD M. RUDOLPH,	*
ALLAN E. SCOTT,	*
WESLEY E. SHOSTEDT,	*
LEONARD L. SOUDER,	*
LEO J. SVIR,	*
DAVID G. SWENSON,	*
LAWRENCE TAHIJA,	*
ANTHONY R. TURK,	*
DONALD A. TYSSEDAL,	*
DONALD R. VEEDER,	*
	*
APPELLANTS,	*
	*
v.	*
	*
LTV STEEL MINING	*
COMPANY, ORE MINING	*
COMPANIES PENSION	*
PLAN AND PENSION	*
COMMITTEE, ORE MINING	*
COMPANIES PENSION PLAN,	*
	*
APPELLEES.	*

Submitted: November 15, 1990

Filed: June 13, 1991

Before LAY, Chief Judge, FAGG, Circuit Judge, and WRIGHT,* District Judge.

FAGG, Circuit Judge.

This ERISA suit arises from the Ore Mining Companies Pension Plan (the plan) sponsored by LTV Steel Mining Company (LTV) and administered by the plan's pension committee (the committee). See generally Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988). Fifty-two former and current hourly LTV employees (the employees) appeal the district court's order granting summary judgment in favor of LTV, the plan, and the committee. Forty-four of the employees assert LTV and the committee violated ERISA by breaching their fiduciary duties and discriminating against the employees in administering the

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*The HONORABLE SUSAN WEBBER WRIGHT, United States District Judge for the Eastern District of Arkansas, sitting by designation.

plan. These employees also assert LTV violated ERISA by amending the plan in practice. All the employees contend LTV violated ERISA when it formally amended the plan. We affirm.

The fifty-two employees are plan participants and members of the certified union. Forty-four of the employees applied for early retirement in 1987 under plan subsection 2.6(d), which allows a participant meeting certain age and years of service requirements to retire early if the participant "considers that it would be in [the participant's] interest to retire, and [LTV] considers that [the] retirement would likewise be in its interest and, by applying like rules in a non-discriminatory manner to like or similar circumstances, approves an application for retirement under mutually satisfactory conditions."

Before the employees applied, LTV had determined it was in the company's inter-

est to allow early retirement under subsection 2.6(d) only if the early retirement would allow the company to reduce its work force permanently. Under this guideline, LTV allowed salaried employees to retire early because they were terminable at will and the company could permanently eliminate their positions. The collective bargaining agreement with the employees' union, however, prevented reductions of the hourly, unionized work force without the union's agreement. In effect, LTV had adopted a policy of denying early retirement to all hourly employees under subsection 2.6(d) of the plan, unless the union agreed to a corresponding permanent reduction in the number of hourly jobs. LTV informed the pension committee of this policy. Consequently, when the employees applied for early retirement, the pension committee denied their applications in writing, stating early retirement was not in the company's interest. Later, after

Congress enacted the Retirement Equity Act of 1984, 29. U.S.C. § 1054(g)(2), LTV and the union agreed to amend the plan to eliminate subsection 2.6(d).

First, the forty-four employees argue LTV breached its fiduciary duties in denying them early retirement benefits under subsection 2.6(d). See 29 U.S.C. § 1104(a)(1). We disagree. The employees concede LTV acts in a dual capacity as both plan fiduciary and employer. Under the dual capacity doctrine, LTV can act "'in accordance with its interests as employer when not administering the plan or investing its assets.'" Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988) (quoted case omitted). "Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits." Dzinglski v. Weirton Steel Corp., 875 F.2d 1075, 1079 (4th Cir.), cert. denied, 110 S. Ct. 281 (1989).

Here, LTV made a business decision that early retirement was not cost effective if the retiring employee had to be replaced. We conclude LTV acted as an employer, not a fiduciary, in deciding whether the employees' early retirements were in the company's interest. See Berger v. Edgewater Steel Co., 911 F.2d 911, 918 (3d Cir. 1990), cert. denied, 111 S. Ct. 1310 (1991); Hickman, 840 F.2d at 566-67. Thus, ERISA's fiduciary standards do not govern LTV's decision to deny the employees' applications. Berger, 911 F.2d at 919.

The forty-four employees also argue the committee breached its fiduciary duties in denying their applications. The pension committee, however, had no authority to override LTV's business decision. After LTV informed the committee that early retirement was not in the company's interest, the committee could only deny the employees' requests. Berger, 911 F.2d

at 918-19. Applying the de novo standard of review, we conclude the committee did not breach its fiduciary duties in denying the employees' applications. Id.; Dzinglski, 875 F.2d at 1079.

Second, the forty-four employees argue LTV and the committee discriminated against them in violation of 29 U.S.C. § 1140 by allowing salaried employees, but not hourly employees, to retire early under subsection 2.6(d). To establish a prima facie case of discrimination under 29 U.S.C. § 1140, the employees must show: "'(1) prohibited . . . conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee[s] may become entitled.'" Berger, 911 F.2d at 922 (quoted case omitted). The employees failed to show any purposeful interference on the part of LTV or the committee. Indeed, the record reflects LTV allowed hourly employees to retire early under subsection 2.6(d) when

the retirement was accompanied by a permanent reduction in the work force. As the plan required, the committee followed LTV's determination that the employees' early retirement was not in LTV's interest. We thus conclude neither LTV nor the committee discriminated against the employees in violation of 29 U.S. § 1140.

Third, the forty-four employees argue LTV violated ERISA when it amended the plan in practice by adopting the policy of denying early retirement under subsection 2.6(d) unless the retirement was accompanied by a permanent reduction in the work force. We conclude this policy did not amend the plan. Instead, the policy was a guideline LTV used to decide whether early retirement was in LTV's interest. The plan's terms clearly allow LTV to make this decision.

A common theme pervades the employees' arguments up to this point. The employees basically complain subsection

2.6(d) is unfair because it allows LTV to decide unilaterally that early retirement is not in the company's interest. See Dzinglski, 875 F.2d at 1078. Unfortunately for the employees, however, our role is to assure the plan is fairly administered, not to rewrite plan provisions. Id. In the absence of any showing of bad faith, we decline to deny LTV of its power to decide whether early retirement is in the company's interest. See Berger, 911 F.2d at 919; Dzinglski, 875 F.2d at 1079.

Finally, all fifty-two employees argue LTV violated 29 U.S.C. § 1054(g)(2)(B) by formally amending the plan to eliminate subsection 2.6(d), with the consent of the employees' union. An employer cannot decease a participant's accrued benefit by amending a pension plan. 29 U.S.C. § 1054(g)(1). If a participant satisfies the preamendment conditions for a retirement-type subsidy, either before or after the amendment, the amendment is

treated as reducing accrued benefits. Id. § 1054(g)(2)(B). In this case, the employees have not satisfied the preamendment condition that their early retirement be in LTV's interest. See Berger, 911 F.2d at 918. Thus, the amendment does not reduce accrued benefits in violation of 29 U.S.C. § 1054(g). See id.

Accordingly, we affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Robert M. Adams, et al.,

Plaintiffs,

vs.

LTV Steel Mining Company, Ore Mining Companies Pension Plan; and Pension Committee, Ore Mining Companies Pension Plan,

Defendants.

Civil No. 5-88-104

ORDER

The above-entitled matter came on for hearing before the undersigned United States District Court Judge on January 19, 1990, on Plaintiffs' Motion for Partial Summary Judgment, and Defendants' Motion for Summary Judgment. Mr. Stanley Efron of Henson & Efron, P.A. appeared on behalf of Plaintiffs. Mr. Raymond L. Erickson and Mr. Richard J. Leighton of Hanft, Fride, O'Brien, Harries, Swelbar & Burns, P.A. appeared on behalf of Defendants.

BASED UPON all the files, records and proceedings herein, and having considered the written and oral arguments of counsel,

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion for Partial Summary Judgment is DENIED; and

2. Defendants' Motion for Summary Judgment is GRANTED, and that the plaintiffs' causes of action be, and hereby are, dismissed with prejudice.

Dated this 25th day of January, 1990.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

Filed Jan 29 1990
Judgment Entered Jan 29 1990

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FIFTH DIVISION

Robert M. Adams, et al.,	)	
	)	
Plaintiffs,	)	
	)	5-88 Civ 104
vs.	)	
	)	
LTV Steel Mining Company, et al.,	)	
	)	
Defendants.	)	

MOTION

January 19, 1990
St. Paul, Minnesota

Robert W. Riley
United States Court Reporter
748 U.S. Courthouse
316 North Robert St.
St. Paul, Minnesota 55101

Transcript of proceedings had in the above-entitled matter before the Honorable Robert G. Renner, one of the judges of the above court in Courtroom No. 2, U.S. Courthouse, St. Paul, Minnesota, January 19, 1990.

APPEARANCES:

On behalf of the Plaintiffs:

Henson & Efron, P.A.
1200 Title Insurance Bldg.
Minneapolis, MN 55401
by Stanley Efron, Esq.

On behalf of the Defendants:

Hanft, Fride, O'Brien, Harries,
Selbar & Burns, P.A.
1000 First Bank Place
Duluth, MN 55802
by Raymond L. Erickson, Esq. and
Richard J. Leighton, Esq.

* * *

THE COURT: The first matter on the calendar is Adams et al versus LTV Steel Mining Company. Let's have appearances.

MR. EFRON: Stanley Efron, Henson and Efron, Your Honor, for the plaintiffs.

MR. ERICKSON: Good morning, Your Honor, Ray Erickson with the Hanft, Fride law firm and the Port of Duluth for the defendants, along with my partner, Richard Leighton.

THE COURT: Thank you. Before the Court are defendants LTV Steel Mining Company; Ore Mining Companies Pension Plan; and Pension Committee, Ore Mining Companies Pension Plan, seeking full summary judgment against plaintiff Robert M. Adams and 51 other plaintiffs. Plaintiffs allege breach of fiduciary duty, discrimination and unlawful decrease of an accrued benefit in violation of the Employee Retirement Income Security Act, ERISA, and breach of contract with regard

to the Labor Management Relations Act, LMRA. Also before the Court is a motion by plaintiffs for partial summary judgment giving certain plaintiffs the right to retire under the retirement benefits at issue in this case and an award of back pension benefits.

Because both summary judgment motions essentially require a consideration of the same issues, the Court will present one statement of facts and one discussion of the claims. However, in preparation for this hearing, the Court has studied all memoranda submitted for both motions.

This litigation centers on an early retirement program known as the "70/80 Mutually Satisfactory Retirement Program," hereinafter 70/80 program offered as part of defendant Ore Mining Companies Pension Plan, hereinafter Plan. This employee pension benefit plan is a pension plan within the meaning of ERISA, 29 USC, Section 1002(2). Defendant Pension

Committee, Ore Mining Companies Pension Plan, hereinafter Committee, administers the plan, and defendant LTV Steel Mining Company, hereinafter LTV Mining, is the employer and plan sponsor. Pickands Mather and Co., hereinafter Pickands Mather, is the managing agent for LTV Mining. The 52 plaintiffs are or were miners for LTV Mining and are participants or beneficiaries of the Plan. Plaintiffs also are or were bargaining unit members of the United Steel Workers of America, hereinafter Union.

The Ore Mining Companies Pension Plan, Section 1.1(1) provides that LTV Mining and committee are fiduciaries, but only with respect to the specific responsibilities of each as described in the Plan and the Trust Agreement. The board of directors of Pickands Mather appoints committee members who are supposed to be five in number, Plan Section 8.1. Apparently during the relevant time for this

litigation, the committee consisted of the following two people: Wayne Speicher, who was the committee's secretary and at relevant times also manager of employee benefits for Pickands Mather; and Henry Whaley, who at relevant times was a vice president for operations at Pickands Mather. It is unclear when Whaley ceased serving on the committee. Whaley testified that he was on the committee only until the end of 1986, yet documents from the committee show his signature in 1987.

The relevant provisions of the 70/80 Program at issue in this litigation are found in Section 2.6 of the Plan which states:

> Any participant who was not attained the age of 62 years and who shall have had at least 15 years of continuing service and (i) shall have attained the age of 55 years and whose combined age and years of continuing service shall equal 70 or

more, or (ii) whose combined age and service years of continuous service shall equal 80 or more, and...

(d) who considers that it would be in his interest to retire, and his employing company considers that such retirement would likewise be in its interest and, by applying like rules in a non-discriminatory manner to like or similar circumstances, approves an application for retirement under mutually satisfactory conditions, shall be eligible to retire on or after April 1, 1986, and shall upon his retirement be eligible for a pension.

For those who meet the age and service requirements, the 70/80 Program provides the possibility of early retirement with full retirement benefits, rather than benefits that are actuarily reduced.

Ordinarily, full retirement benefits are awarded only after a minimum of 30 years employment. In addition, the 70/80 Program provides a $400 monthly supplement until the retiree becomes eligible for Social Security benefits.

In the period from 1982 through April 1, 1986, LTV Mining, which was then Erie Mining Company, hereinafter Erie Mining, used the 70/80 Program as a means of permanently reducing its salaried work force. Depressed economic conditions in the industry necessitated this reduction. Erie Mining also attempted to permanently reduce its hourly work force, but these jobs involved union employees whose job classifications could not be removed from the bargaining unit without the union's agreement. Erie Mining was successful in negotiating a permanent reduction of only two positions in the hourly work force. The two union retirees whose positions were eliminated were offered participation

in the 70/80 Program. Erie Mining did not offer the 70/80 Program to any other hourly employee because such an offer would require Erie Mining to pay the early retirement benefits without achieving a permanent reduction in its hourly work force. That is, the retiree's position would have to be filled by another union member.

In 1986, one of the plaintiffs, Marilyn Grunwald, who had been told that hourly employees weren't eligible for the 70/80 Program, learned that, according to the Plan, the 70/80 Program was available to both salaried and hourly employees. After questioning company officials as to why hourly employees had not been able to apply for the 70/80 Program, Grunwald and others were told that they could apply for the 70/80 Program and that their applications would be processed. In 1987, approximately 65 to 70 hourly employees applied on their initiative for the 70/80

Program. None of these hourly employees were awarded participation in the program. Senior officials of Pickands Mather had decided that it was not in the company's best interest to offer hourly employee participation in the 70/80 program unless such an offer was part of a negotiated agreement with the union that resulted in a reduction in union positions.

Forty-seven of the plaintiffs whose applications were denied filed a grievance with the union which subsequently declined to pursue the matter. Plaintiffs filed this action alleging that defendants' rejection of the plaintiffs' 70/80 Program applications constituted a breach of the LMRA as well as unlawful discrimination and breach of fiduciary duty under ERISA.

In their complaint, plaintiffs also allege that on December 31, 1987, and without notice to plaintiffs or the union, LTV Mining unilaterally amended the Plan to eliminate the 70/80 Program. They

allege that this action constituted a breach of the LMRA and unlawful decrease of accrued benefits, discrimination and breach of fiduciary duty in violation of ERISA.

Wayne Speicher, manager of the employee benefits for Pickands Mather, testified that this amendment had been adopted on December 31, 1987. Later in the course of discovery, however, plaintiffs were informed that the amendment described above had never been adopted but had only been circulated in draft form.

One of the reasons why officials of the LTV Mining had begun to discuss an amendment to the Plan eliminating the 70/80 Program was that the Internal Revenue Service had issued proposed regulations on January 30, 1986, the purpose of which was to restrict an employee's right to receive benefits that were contingent upon the company's consent and the discretion. The benefits provided by the

70/80 Program would have been included among the restrictions, and failure to remove the discretionary benefits would have affected the favorable tax treatment afforded the Plan. To prevent this outcome, LTV Mining and the union had agreed to meet prior to the effective date of the regulation, January 1, 1989, to determine whether mutually satisfactory adjustments were possible in the relevant part of the 70/80 Program. In the course of the meetings, LTV Mining and the union found that adjustments were not possible and the union consented to have LTV Mining administer the Plan without the 70/80 Program based on mutually satisfactory conditions as of January 1, 1989. The parties agreed that a formal amendment memorializing this change will be adopted by September 1090, but the effective date of the amendment will be January 1, 1989.

For the purposes of clarity, the Court would like to lay out its under-

standing of the provisions of the 70/80 Program at issue here before dealing with plaintiffs' individual claims. First, the Court understands that initial eligibility for the Program necessitates certain age and service requirements that are not in dispute; second, the employee must agree that it would be in his interest to retire; third, the employer must agree that the employee's retirement would be in its interest; and fourth, if the previous requirements are met, the application shall be approved by applying like rules in a non-discriminatory manner to like or similar circumstances.

In the memorandum in support of their motion for partial summary judgment, plaintiffs state that the 70/80 Program is available "only when both employee and employer believe the retirement to be in their interest." Yet, plaintiffs' arguments seem to infer that they have an entitlement to the 70/80 Program inde-

pendent of the employer's agreement that such a retirement is in its interest. In Plaintiffs' Response to Defendants' Reply Memorandum, plaintiffs state that they are relying on ERISA "to vindicate their right to retire early." In a letter requesting the president of the union to invoke its grievance procedure in this matter, plaintiffs' counsel states:

> All of the plaintiffs have recently applied for 70/80 retirement benefits believing retirement to be in their interest and the company's interest, thereby establishing mutually satisfactory conditions under the Plan.

Plaintiffs' counsel is misstating the requirements by asserting that the mutually satisfactory conditions are established because a plaintiff believes retirement to be in the plaintiff's and the company's interest. The plain language of the Plan states that the employer must agree that such a retirement is in

its interest. If the opportunity to retire early is ever a right under the Plan, it certainly would not become a right at least until both the employee and employer determine that such an early retirement is in their respective interests.

In its memorandum for partial summary judgment, plaintiffs state that they "do not dispute defendants' version of its use of 70/80 nor defendants' justification for rejecting plaintiffs' 70/80 applications." Defendants assert that LTV Mining had decided that offering 70/80 Program retirement to hourly employees was not in its interest unless such an offer was accompanied by a permanent reduction in the number of hourly jobs at LTV Mining. The credibility of this assertion is supported by the fact that LTV Mining did offer 70/80 Program retirement to two hourly employees under circumstances in which it had negotiated with the union to

eliminate jobs. It seems to this Court that plaintiffs failed to create an issue in fact as to whether their employer agreed that it was in its interest to have them retire early, and that such a failure renders questions about the fourth requirement for the Program -- that is, that the application shall be approved by applying rules in a non-discriminatory manner -- moot. However, the Court acknowledges that some of the difficulties in this case result from a telescoping of steps plaintiffs followed in meeting the requirements. This has led to a lack of clarity about when the decisions were made, by whom and in what capacity. Thus, the Court will proceed to consider plaintiffs' individual claims.

Plaintiffs allege that by rejecting their 70/80 Program applications, defendants have violated their fiduciary duties pursuant to 29 USC, Section 1104. Citing 29 USC, Section 1104(a)(1), plaintiffs

assert that defendants' fiduciary obligations require them to discharge their duties solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to them. However, the parties agree that the defendants have dual roles in relationship to the plaintiffs. In some situations, the defendants are plaintiffs' employer, and in situations involving the administration of the Plan, defendants are fiduciaries. The critical question then is when were the defendants acting as the employer and when were they acting as a fiduciary in the course of the process in which plaintiffs' applications were rejected?

The answer to this question is clouded a bit by the fact that LTV mining's process for applying for the 70/80 Program did not separate requirement three -- that is, the determination whether the employee agreed that an early

retirement was in its best interest from step four -- that is, approving the application by applying non-discriminatory rules. Plaintiffs submitted their applications to local mining officials who forwarded them to a central Pickands Mather office and the committee. Apparently the persons who ultimately received the applications, Speicher and Whaley, were officials of Pickands Mather, who acted for LTV Mining. They were also committee members. They knew of and perhaps were involved in the company's blanket decision that it would not agree that early retirement for an hourly employee was in its interest unless accompanied by a job reduction. That decision on the part of the employer is clearly a business decision that is not governed by ERISA's fiduciary standards. See Hichman versus Tosco Corp., 840 F.2d 564, a 1988 Eighth Circuit decision; also Hlinka versus Bethlehem Steel Corp., 863

F.2d 279, a Third Circuit 1988 decision. Therefore, to the extent that committee members who were also Pickands Mather employees were involved in the company's decision regarding when early retirements would be in the company's best interest, they were acting as employers. Plaintiffs cite Dockray versus Phelps Dodge Corp., 801 F.2d 1149, a 9th Circuit 1986 decision, to argue that some courts have found 70/80 Program employer decisions to be governed by a fiduciary standard. That case is not relevant, however, because it does not involve an early retirement requiring mutually satisfactory conditions.

Based on its knowledge that LTV Mining did not find plaintiffs' application for early retirement in its interest, the committee sent rejection letters to the plaintiffs. Requirement four -- approval of the applications -- was not appropriate because plaintiffs had not met

requirement three -- employer requirement. The Court observed that any other responses on the part of the committee would have been a breach of its duty because it would be inappropriate for a fiduciary to grant an early retirement under the 70/80 Program when the requirements had not been met.

Plaintiffs further assert that defendants breached their duties by not stating specific reasons for the denial as required by the Plan, Section 8.2(h). However, the letters sent to plaintiffs did state that plaintiffs did not meet the mutually satisfactory conditions requirement. The Fourth Circuit in Dzinglski versus Weirton Steel Corp. at 875 F.2d 1075, a Fourth Circuit 1989 decision, found that ERISA does not require a fiduciary to disclose an employer's specific reasons for deciding that an early retirement is not in its interest. In Dzinglski, the court stated that the plan

does not allow the committee as fiduciary to examine the decision of the employer. In other words, the role of fiduciary is to communicate to the employee that the employer made the business decision that the early retirement is not in its interest. This Court is in agreement with this rationale because it maintains the distinction between the employer's decision and the fiduciary's obligation to act upon and communicate the decision once it is made.

To summarize with regard to fiduciary duty -- the parties do not dispute the facts with regard to the rejection of plaintiffs' application for the 70/80 Program. Under these facts, the Court is inclined to grant summary judgment to the defendant as it finds no violation of any fiduciary duty. Plaintiffs allege that defendants' rejection of their 70/80 Program applications also constitutes a violation of LMRA. The statutory basis of

this argument is unclear, but plaintiffs allege that LTV Mining and the union unlawfully used the collective bargaining process to restrict the availability of the 70/80 Program for union employees. This argument has no merit for several reasons. The union employees did not have an entitlement to early retirement that was capable of being restricted. The union is not a defendant in this case, and the defendants, when acting as fiduciaries, were contractually obligated by the Plan to reject plaintiffs' application because they did not meet the requirement of employer agreement.

In their complaint, plaintiffs also allege that defendants violated 29 USC, Section 1140 by unlawfully discriminating against hourly employees. Defendant argues that plaintiffs' claim is not actionable under Section 1140. Both parties cite West versus Butler at 621 F.2d 240, a 1980 Sixth Circuit decision.

In West, the court found that Section 1140 was designed to prevent "unscrupulous employers from harassing the employees in order to keep them from obtaining vested pension rights." As discussed before, and despite plaintiffs' contentions to the contrary, early retirement under the 70/80 Program is not a vested right. Plaintiffs argue that they were discouraged from and incorrectly informed about applying for the 70/80 Program, and that seems to be true. However, such actions on the part of the defendant do not rise to the level of interference with a vested right.

Plaintiffs also argue that all employees were equally entitled to early retirement. They assert that early retirement under the 70/80 Program were administered in a discriminatory manner because it was offered to salaried employees but denied to hourly employees. This argument fails because it is again based on the erroneous premise that they had a

right to early retirement under the 70/80 Program. Plaintiffs may dislike LTV Mining's rationale for rejecting their application, but the fact remains that the terms of the Program require that both the employee and the employer agree that early retirement were in their interest.

In the face of these undisputed facts, the Court does not find a legal basis on which plaintiffs can sustain their allegation of discrimination.

The Court now turns to plaintiffs' allegation that defendant unilaterally amended the plan to eliminate the 70/80 Program. The facts uncovered in the course of discovery have revealed plaintiffs' allegations to be unfounded. The affidavit of Mary T. Cushing, which plaintiffs do not dispute, states that the amendment of the Plan to eliminate the 70/80 Program was a negotiated joint decision in which both LTV Mining and the union participated.

However, plaintiffs still maintain that defendants violated the LMRA by its elimination of the 70/80 Program. Plaintiffs did not identify the specific provisions of the LMRA they alleged to have been violated. It appears to this Court that the amendment of the Plan to eliminate the 70/80 Program was achieved through bilateral negotiations and mutual agreement on the part of LTV Mining and the union and that, therefore, there was no breach of any collective bargaining agreement in violation of LMRA.

Plaintiffs also argue that the elimination of the 70/80 Program constituted an unlawful decrease of an accrued benefit in violation of ERISA, 29 USC, Section 1054(g). The Court does not dispute the value that plaintiffs place on the possibility of early retirement. However, ERISA, 29 USC, Section 1054(c)(1) states that an accrued benefit can be decreased by an amendment that satisfies the re-

quirements of 29 USC, Section 1082(c)(8). Plaintiff has created no issue of fact as to whether Section 1082(c)(8) has been followed. It appears to the Court that LTV Mining and the plaintiffs' union freely agreed to a modification of the Plan that is not precluded by ERISA, and that such an agreement was made in the manner that was legal and proper. Therefore, the Court finds that the amendments of the Plan to eliminate the 70/80 Program did not violate ERISA. Because the process by which the 70/80 Program was eliminated was mutually agreed upon by LTV Mining and the union, and in accord with the requirements of ERISA and LMRA, the Court also finds that plaintiff has created no genuine issue of fact as to whether this action constituted a breach of fiduciary duty in violation of 29 USC, Section 1104(a)(1), and/or unlawful discrimination in violation of 29 USC, Section 1140. Plaintiffs are bound by the

collective bargaining of their union. If the plaintiffs are dissatisfied with the outcome of that collective bargaining, then they must bring their complaint to their union.

Finally, plaintiffs move this Court to award early retirement under the 70/80 Program to 47 plaintiffs whose applications were rejected and to award back pension benefits. Obviously, if the Court grants summary judgment to the defendants, plaintiffs' motion must be denied. However, whatever the outcome of defendants' motion, summary judgment as requested would be inappropriate because defendants have minimally created a question of fact as to whether plaintiffs' employer agreed that plaintiffs' early retirement is in its interest.

Now, I have been as candid as possible in stating my views. Those views have been obtained from the briefs and submissions of the parties. I would ask you

now as to the facts first, have I misstated the facts? If so, let me hear from you.

MR. EFRON: Your Honor, if I may address that.

THE COURT: Very well.

MR. EFRON: I believe there is a substantial misstatement of the facts. The first set of facts that we contend have not been covered completely by the Court relates to the operation in practice of the so-called 70/80 provision. One of the things that we always feared over the years when we drew the pension plans, and particularly after ERISA came into effect in 1974, is that no matter what the plan said, the conduct of the employer in operating the plan could effectively amend it.

THE COURT: You are speaking as to your view as to the law which would govern --

MR. EFRON: No, Your Honor, I am getting at the facts, but I am giving you a basis for what I am talking about. We look here at the conduct of this particular employer in terms of the facts. It says, for example, that it made a decision -- Mr. Carlson states that in his testimony. They made a decision before these applications were made that they were not going to grant any 70/80s to hourly workers.

And the testimony they gave shows that the reason they were not going to grant any 70/80s to hourly workers is because it was less expensive to lay them off instead of offering them the kind of benefits that they offered to the salaried workers. And they also say they then conducted a reduction in force for the salaried workers, but did not conduct a reduction in force for the hourly. That's simply untrue. If you look at the Manning tables from 1982 through 1986, they re-

duced the hourly force on a permanent basis through the use of layoffs by approximately 30 to 40 percent, far greater than the percentage reduction in the salaried. What they did instead in practice, and what the facts show, is they used an early retirement window to get rid of older salaried workers without taking a chance of violating any age discrimination rules by making it a so-called voluntary program. Even there, the facts are not correct, because as the testimony shows, if a salaried worker didn't accept the proposal for this voluntary retirement, he could be demoted, and some were, until they got the message and applied for 70/80.

So in practice, this employer, the facts show, amended this plan to say something he could have said before he drew the plan, we are not going to cover any hourly workers. They put that provi-

sion in the plan. That's an employer decision when they made it.

THE COURT: What I am interested in at this time is to find out which fact you think would be important for the Court to recognize as being relevant and pertinent to your motion.

MR. EFRON: The relevant facts are that this was not a voluntary program in any event, that the employer had emasculated those provisions of the plan in operation, both as to salaried and hourly, first by making it a plan provision which they had already put in many years before, making a plan provision which only operated on their initiative. And if they offered it and you didn't like it, you got demoted. And then, hiding behind the collective bargaining agreement for the hourlies when in fact the only reason they didn't offer it to the hourlies was because it was cheaper in their view to lay off the hourlies, to reduce the force

in that fashion rather than grant them 70/80. And the Manning table that's in the evidence shows that.

THE COURT: Let me stop you there. Is there any disagreement with that addition to the facts?

MR. ERICKSON: There is, Your Honor.

THE COURT: All right. I will give you an opportunity to be heard.

MR. ERICKSON: Thank you, Your Honor.

MR. EFRON: If you look at the two agreements entered into between the union for the two people who were offered 70/80, these were not reductions in force. As they said, that's the only reason they were going to do 70/80 reductions in force, these were reclassifications and changes in work rules. If you read through the document completely, what they were trying to do is modernize their work rules, modernize the classifications. And in return, union, we're going to give you a bone. If you will agree to this, we

will give you a 70/80. We won't give it to one of these people who applied for it. We'll just give you one. You designate who gets the 70/80 under those circumstances. And we've decided that's the bone.

That's not operating into the mutually satisfactory provisions. That's another way of amending the Plan. I don't want to get away from the factual situation. I will come back to this issue in some depth --

THE COURT: I am going to give you an opportunity to argue the law.

-MR. EFRON: We'll come back to that in some depth, was whether they can amend the plan by collective bargaining. But that's the beginning of the factual error in this case, is that in fact what you recited were not the complete facts.

THE COURT: I can understand your view as to that. But do you take issue with any of the facts as stated by the

Court, realizing that you interpret them differently and you would add to them facts which you feel are important to your position?

MR. EFRON: You stated, for example, that they had made the decision that they didn't want to pay benefits without a reduction in the work force. That's simply a fact that has no support in the record. There was a reduction in the work force.

THE COURT: Why don't we change it to this -- that the defendants maintain that they did not want to grant the applications to the 70/80 Program unless there were reductions?

MR. EFRON: But the facts show that there was in fact a reduction.

THE COURT: That's a matter of argument.

MR. EFRON: No, that's a matter of their own factual material they supplied

to us, which shows a reduction in the Manning table.

THE COURT: I understand that. But that also is a matter of argument. I can't put down all the facts because we would be here all day writing facts. I am trying to get the essential facts that without which your case can't survive nor could the defendant be heard in opposition.

MR. EFRON: They said, Your Honor, they made the bald statement it wasn't in their best interest to grant this because it was too costly. It's just as costly to grant the benefits to the salaried workers. And as a matter of fact, it didn't cost the employer a dime in either case.

THE COURT: I am going to consider that argument. You can argue that.

MR. EFRON: But that's in the facts, Your Honor, because --

THE COURT: You can argue it as your position as to what the facts will be.

MR. EFRON: Well, Mr. Whaley testified to the fact on examination, and that's in the record, Your Honor.

THE COURT: What did he testify to?

MR. EFRON: He testified to the fact that in accordance with the 5500, which is also in the record, the plan was overfunded by over $40 million. And all these benefits don't come out of the employer's pocket, they come out of the plan.

THE COURT: Do you want me to agree to that?

MR. EFRON: Yes, Your Honor.

THE COURT: I will accept it.

MR. EFRON: What I am trying to point out is that what they say and what they do are two different things.

THE COURT: That's a matter of argument. I will let you argue that to your heart's content.

MR. EFRON: Now, they also make -- and you've almost found it as a factual matter. They have also made some assertions about the IRS regulations. Those are not facts, and those are not factual matters. Mary Cushing's affidavit, by the way, is not a correct interpretation of the Internal Revenue Code.

THE COURT: Are you arguing with that?

MR. EFRON: I am disagreeing with her affidavit, and I am saying that that's not a fact. She recites it as if it were a fact. And I am saying to the Court that you have --

THE COURT: All I am interested in -- and I am not trying to take the position of the IRS, accept or reject it. I am just trying to point out that the parties apparently, at least the union and the employer, have agreed amongst themselves that they have to do something as regards

the plan by reason of positions taken by the IRS.

MR. EFRON: We haven't yet completed discovery as to what the union agreed to and how they agreed to it. But I would point out if you examine the document the union apparently agreed to, all it requires is that the employer do nothing for the time period involved, and they will have the right to "amend" the Plan.

THE COURT: Are you saying then that the Court's understanding as to the dates that it recites as to the effective date for changing of the plan in accordance with IRS objections, that those dates are in error?

MR. EFRON: No. The dates are not in error, Your Honor.

THE COURT: Are you saying --

MR. EFRON: The conclusion you draw from the facts, the factual conclusion you draw is in error because in our view this

was not a real negotiation. If you read the document, there is --

THE COURT: How would you state it?

MR. EFRON: I would state it the fact the union executed the document, but in fact the document required no action on behalf of anybody for the amendment to go into effect. So it was no different --

THE COURT: Is there any disagreement with that position.

MR. ERICKSON: Your Honor, in point of fact, we have the evidence before the Court. There is no rebutting affidavit. Mr. Efron is suggesting that he has discovery, but --

THE COURT: It doesn't seem to me, though, that it's a matter of such consequence that we have to spend a lot of time arguing it. There is no question but what the union and the employer have been advised by IRS something to the effect that the plan as it presently stands needs amendment. Is that not correct?

MR. EFRON: I'm sorry, Your Honor. I was reading something.

THE COURT: Is it not correct that by virtue of the IRS actions, that the union and the employer are doing something, regardless of what it is, in response thereto? Isn't that the case?

MR. EFRON: I don't agree that it's by virtue of the IRS actions, Your Honor. The union and employer were doing something which the employer thought had to be done.

THE COURT: Let me ask you this. How come there is no corresponding affidavit against the affidavit on file saying what the IRS is doing.

MR. EFRON: Because the code itself speaks for itself, and the Treasury regulations speak for themselves. And they didn't produce any documents from the IRS. They say by interpretation that the IRS requires it. The Court can interrupt it just as well as Mary Cushing. And we can

interpret it just as well as Mary Cushing. And we don't agree with her interpretation at all.

THE COURT: Let's move on. I will reject your request for a change as to the IRS matter.

MR. EFRON: Now, the question of entitlement to an early retirement, as the Court discussed the matter, I don't think is a factual issue. That's a legal issue. So I won't argue with you about the conclusion you draw from that. But we will get to that in terms of discussing the applicable law regarding protected interests under ERISA. And that applies to this whole vested right interest.

And then the question of whether, as a matter of fact, this was a legal and proper amendment is a conclusory or legal decision and not a decision to be made by Mary Cushing. It's a matter of what follows from ERISA and the Internal Revenue Code. But what we're concerned

about, Your Honor, is the Court's acceptance of some of what is recited as fact in terms of applicable law. It's not fact.

And what happened here between 1977, when they thought they could unilaterally amend the plan, and 1979, when this amendment is taking effect, is that they discovered that the code provices certain provisions that require certain things and protect certain things. So they thought they would make an end run around the code with a so-called collectively-bargained agreement. Neither the union nor any other body can collectively bargain away anybody's ERISA rights no more than they bargain away discrimination or anything else.

THE COURT: Now you are arguing the law. I want to stick to the facts.

MR. EFRON: Those are the basic facts that we're disagreeing with, Your Honor.

THE COURT: Very well.

MR. ERICKSON: Thank you, Your Honor. For the record, I don't take exception in any material respect to the facts as the Court has recited them. I am not going to stand here and argue at length in opposition to Mr. Efron because I don't believe he has indicated to the Court where in this evidentiary record the Court could find the changes that he is asking the Court to make.

With respect to the questions of layoffs, there isn't a soul in the state of Minnesota that doesn't know that each of the mining industries in the first half decade of 1980 went through horrendous layoffs. The difference, Your Honor, is that a layoff is temporary. The layoff is subject to calling back rights. They are not permanent reductions in the work force. So we can argue at length about layoffs. But in point of fact, we're talking about permanent reductions. So that they company will not have a payroll

in the future as to which employees will have recall rights.

Secondly, Your Honor, there is no counteraffidavit to that of Mr. Whaley to the effect that there were in fact two job position eliminations in 1987 that led to the award at the request of the union of 70/80 pension to bargain unit members. So again, Mr. Efron is unable to cite any factual basis for a suggestion that the Court should change its facts in some material respect.

Thank you, Your Honor.

THE COURT: I am going to recognize that it's plaintiffs' position that the employer made a conscious decision to act the way it did with regard to the 70/80 Program because it found it less expensive to lay off rather than to grant program benefits. I recognize that as the plaintiffs' position. Other than that, the suggested fact to be added seems to me to be more argument. I have no problem with

recognizing them as facts that plaintiffs believe should be recognized. But for purposes of the motion, I do not believe it is necessary.

Mr. Efron, I am going to give you 15 minutes to argue at this time.

MR. EFRON: Thank you, Your Honor. Let me just add to the response and comments from counsel -- that if you looked at Exhibits 5 and 6 to Mr. Ginsburg's affidavit, which deals with precisely the letters between Erie Mining and the local steel workers, it does describe in great detail how the so-called 70/80s came about.

With respect, Your Honor, to the legal issues, the --

THE COURT: By the way, I forgot to give the parties the opportunity to challenge the Court's application of the law. I don't mean to say that you have to agree with the Court's interpretation as to the facts and the law to be applied to

the facts at hand. But has the Court generically misstated any law?

MR. EFRON: I think with respect to the Internal Revenue Code and ERISA, yes, Your Honor. And I want to get to that by first starting out with --

THE COURT: I just want to give you the opportunity to state for the record. You have stated it for the record. Now you can argue it to your heart's content.

Yes.

MR. ERICKSON: I have no quarrel with the Court's recitation of the law.

MR. EFRON: In 1989, Your Honor, Firestone Tire versus Bruch case in the Supreme Court, made an important change in the standard for judicial review of this type of conflict between employees and employers, because up until Firestone versus Bruch, the general impression was that if the administrator made a decision, it was entitled to great weight, deference, et cetera. And the Supreme Court

clarified that, but pointing out that the discretion to determine eligibility or interpreting a plan must be exercised in good faith. That was argued very seriously before the Supreme Court, the employer arguing that good faith wasn't an issue.

The Dockray case which the Court alluded to earlier also points out -- and that's a Ninth Circuit case -- that substantial deference is granted to a decision of a wholly independent fund trustee, but not to an administrator who is a member of the employer management. We think that's important to the standard of review here, because here we have an administrator and management where you can't tell who is who at any given point in time, or whether in fact they exercised any discretion at all.

We know for a fact, Your Honor -- and I should have alluded to this earlier in the discussion of the facts -- that no rules were created, despite the fact that

the plan says that the plan is to be applied in accordance with rules promulgated in a non-discriminatory manner. That language, by the way, is probably unique to this among the various 70/80 cases when they talk about applying it according to rules in a non-discriminatory manner.

With the background about the fiduciary aspects, I want to separate out what is an employer decision here from what is a fiduciary decision. If you are involved in administration of the plan assets, it is said in the courts that you are involved in a fiduciary decision. And you can look at Trenton versus Scott Paper, Moore versus Reynolds, Cunha versus Ward, Hickman versus Tosco, which is the Eighth Circuit case. All say that the decisions that don't involve administration of plan assets are employer decisions.

For example, in Hickman, which the Court alluded to, or counsel did, I can't

remember which, that was a case where the employee was being terminated. He wanted to be extended to retirement age. And they terminated him instead. The Court said that's an employer decision to fire him instead of extending him to retirement age. It has nothing to do with the plan. In Cunha versus Ward, the employer decision to terminate the plan as a whole was said to be an employer decision, it's not protectable. In Moore versus Reynolds, they decided not to establish a plan, and that was an employer decision that was not protectable. And even in Trenton versus Scott Paper, the design of the benefit plan was an employer decision, and not protectable.

So in this case, for example, as other courts have pointed out, had LTV or its predecessor, Erie Mining, decided the design of this plan that they were only going to give a 70/80 mutually satisfactory where there was a permanent reduc-

tion force, they could have easily said so. As a matter of fact, they did say so in a, b and c. But in subparagraph d, they added something above and beyond that. And this was the provision for mutually satisfactory in the interest of both parties. So they've designed the plan with that in it, and now we come to administering it. And it's our view, our interpretation of the Supreme Court decision and the cases that have come down, including Dockray and Hlinka and Dzinglski, that this was an administration, a fiduciary act, not an employer act.

THE COURT: Couldn't they have made it much clearer, though, by expressing proper articulation of what it was they intended?

MR. EFRON: I don't follow that, Your Honor.

THE COURT: You are separating out the third part of it, the mutual interest

part, and saying this part has nothing to do with the employer's decision. This is the part that mandates administration of the plan.

MR. EFRON: What I am saying is that whenever you are designing a plan, if you didn't want to put this provision in, you didn't have to. Once you put it, you've got certain standards you have to follow in administering it. And once you put it, as we'll get to in the argument about what ERISA protects, you can't take it out because it's an early retirement provision. You can't take it out without following certain provisions. And that's why their initial decision to unilaterally amend it was abrogated, and they said well, we better get the union to consent or find some other way of getting out of this thing. And they said in their own affidavit, we would have violated the Internal Revenue Code. We maintain they

did violate it. That's the thrust of what we're arguing about here.

We've got two groups of employees here, by the way, Your Honor. We've got those who were eligible for the provision involved and those who are not yet eligible for it, a handful of those seven or eight of the plaintiffs, but will be eligible in due course for it. And they're claiming that they're protected as well, and that they're entitled to the protection by this Court of that benefit, because if you look at the Treasury regulations, the very Treasury regulations that they were pointing to, that the defendants were pointing to as being the problem for them, you take a look at Treasury regulation Section 1.411(d)(4), they have a question number 2 under those regulations, a question posed by the Treasury and answered by them. And in that it says that a 70/80 type benefit -- that is, an early retirement type benefit

-- can only be entered under certain conditions.

Comparable subsidy, the elimination is necessary for favorable tax treatment. But they could have gotten favorable tax treatment just by appointing an independent trustee to make those decisions because the gravamen of the problem with the IRS was the employer shooting craps in his own hat, so to speak, telling you what was on the dice. The IRS said you can't do that. You can't play games with this sort of thing. So all they had to do was appoint an independent trustee to make that decision as a fiduciary, and they would have eliminated the problem.

Under question two, the answer says, "This provision specifically protects the subsidized early retirement benefit, even for those who have not yet reached the retirement trigger age," that small group of our plaintiffs. If you will read that question and the answer, Your Honor, I

think it gives a much clearer explanation than anything I could possibly give as to why this was a protected right, and why it could not be removed by collective bargaining or in any other way except by substituting something of equal value or by modifying the process so that they eliminated the potential for abuse by the employer, which was exactly what the Internal Revenue Service was just trying to do with the change in 1986.

Now, let's go back a little bit to the 70/80 eligibility thing. Dzinglski versus Wierton Steel, that's a case that wasn't a 70/80 case at all. It's not even an early retirement case. The plaintiff had been fired. He applied on the same day after he had been fired, he applied for early retirement. That is hardly analogous facts. And the Court throws out all of the discussion of early retirement on that basis. This man cannot come in the back door, they said. He's already

been fired. You can't then apply for early retirement. You are done as an employee.

Hlinka said the eligibility for 70/80 is a business decision. It's an employer decision where no evidence of discrimination is present. It's not this case. And Dockray said in parallel circumstances -- it didn't involve a 70/80, but it was a parallel early retirement provision -- that eligibility is a fiduciary decision. Notwithstanding the fact that we read this and we say mutually satisfactory, what does mutually satisfactory mean? And what it means is that you have to, in the absence of rules -- and there weren't any rules -- that you have to administer this in a non-discriminatory manner.

THE COURT: You have five minutes.

MR. EFRON: The LMRA applicability, it is not as complex as it might appear. A violation of ERISA is a violation of the Labor Management Relations Act. So when

the union and the employer connive, conspire, agree, whatever you want to call it, to violate ERISA, it violates the Labor Management Relation Act. That's what creates that particular cause of action. They argue that we were dissatisfied with the fruits of the contract negotiations. You darn right we were dissatisfied with the fruits of the contract negotiations, because first the employer says there is no 70/80 for hourly workers. Then they say oh, there are two separate plans, and only the salaried have that. Then they split off the salaried in 1986. Notice they preserved the 70/80 for the salaried. They said new salaried hires are not going to get 70/80. They could have done that for the hourly just as easily, and said we will leave it in, freeze it for those who are here, new hourlies are not going to get 70/80. They didn't do that. They discriminated even in that way. They just abolished it

completely. They tried to abolish it in '87 immediately after our plaintiffs applied. They said oh, my God, we've got something we can't control here. Let's get rid of it. And they found out they couldn't get rid of it, because the code provides otherwise. So they tried by collective bargaining to get rid of it. And they couldn't get rid of it in that fashion, because you can't bargain away a protected right.

And the Treasury regulations and the Internal Revenue Code, Section 411(d)(6), which is an ERISA provision codified in the Internal Revenue Code, simply says any retirement subsidy, any early retirement provision is a protected benefit. It doesn't have to be vested to be protected. It's a protected benefit which you cannot take out of a plan and which you can't apply discriminatorily when it's in the plan.

That's the gist of our argument, Your Honor. The gist of our argument is on the legal issues -- that in fact they amended this plan. They amended it in operation. They amended it exactly and as what we fear when we draw these plans. In operation they simply said, we've got two plans here. We've got a salaried plan and we've got an hourly plan. And the hourlies we're not going to give them any mutually satisfactory, because it doesn't fit our profile of what we want to do. We would rather have the older workers than train new ones. That's the reason. The fact of life is, Your Honor, they've got to retire anyway. They've got to train new ones in any event. And that happens all the time. And many of these people are already retired now under the normal retirement provisions, since this took place a few years ago. And they're training replacements, just like they trained replacements for the salaried workers. It's a phony

reason. But the beauty of the salaried situation is that they're more technically qualified. The young people know how to operate computers and that sort of thing, and they're more technically qualified -- and they testified to that -- whereas with a miner, a miner is a miner, whether he is young or old and so forth.

But from the miner's point of view, it's a different matter. You are on a yo-yo. Starting in 1982 through 1987, if you look at the Manning tables that are part of the exhibits, they laid off enormous numbers of people. They called back some, laid off some, called back some. They were on a constant yo-yo. It's a wonderful employment situation when you are being laid off, called back, laid off, called back, and you don't know whether things are going to go on or not. You want to go on with your life. They wanted, like those salaried people who took early retirement, they wanted to go

off and do something else with their life at an age where they could still do it and with that early retirement subsidy. And it is true, the employer could have operated this plan in a way that was in accordance with the plan provisions and denied 70/80, and done it in a non-discriminatory way, and they didn't do it.

And I'll give you the most classic example of how to do it the right way. It's from Shaw versus NVF -- which I thought I had here with me -- in which the employer's committee after summarily turning it down went back on rehearing --

THE COURT: That's all right. Just when you get the citation, give it to me.

MR. EFRON: The Shaw case is cited. But the employer committee went back on rehearing and said this is a man who is involved in making policy decisions for us. And he is unique. And therefore, we have a good reason for not giving him a 70/80 even though we've granted other

people 70/80. In this case, they made no attempt to do that sort of thing. They didn't sit down and say, is there really a cost factor for the hourly workers that is not there for the salaried workers? After all, we take these benefits completely out of the pension plan. And we're overfunded by $45 million. And there wasn't any dispute about that. Does this really cost us anything now? Maybe it will cost us something down the line when we use up this excess. They didn't go through any of the reasoning on either decision. All they knew was in their view it was cheaper to get rid of the salaried by early retirement window and cheaper to keep the hourlies on the layoff yo-yo.

That's our view of the law, Your Honor -- that this is a protected benefit under ERISA, under the Internal Revenue Code codification of ERISA. And no matter what they say about how they operated it, the fact of life is that they amended this

out of the plan in a discriminatory fashion. And they could have done that when they formed the plan. That's an employer decision. But they can't do that unilaterally or even with the union's agreement once it's in the plan. Had they operated the provision properly, we wouldn't be here today. But they didn't. They simply said that provision isn't there for you.

Thank you, Your Honor

THE COURT: Mr. Erickson.

MR. ERICKSON: Thank you, Your Honor. I will be brief. I will confine my comments only to respond to what Mr. Efron has raised in his argument to the Court. His reliance upon Firestone versus Bruch I believe is misplaced, and we have addressed that in our brief. It's misplaced for the principal reason that the Supreme Court in Bruch made very clear that if the plan document vests discretion into the fiduciaries, the Court then uses

as a standard of review the arbitrary and capricious standard, which means that the Court has to find that there is essentially no rational basis for the decision that the committee made. In this case, I think the Court in its suggested findings at least has indicated that there was a rational basis.

But beyond that, Your Honor, with the contract language involved here -- and it isn't unilaterally imposed contract language, it's language that's negotiated through the Labor Management Relations Act -- there was no discretion in the committee. I am sure that Mr. Efron and his clients would have entirely different view of the matter had the company said, Mr. Adams, you are getting early retirement, you get out of here, and Mr. Adams didn't want it. Mutuality is a very simple thing. It requires mutuality. It requires a common agreement. To avoid all that, the plaintiffs urge the Court to

subvert the negotiating process. Unfortunately for the plaintiffs, the language before the Court is not unique to this particular company.

The language in Bethlehem, in the Hlinka case is exactly the same. And the reason is that it was commonly negotiated and is standard to the industry. The record reflects that the same language was applicable at Hibbing Taconite Company. And the same language is applicable at Pickands Mather Services, Inc.

Now, how do the plaintiffs contend that this Court should exert jurisdiction over unions and parties that are not here present? They don't do it by way of affidavit, and they don't do it by way of any factual citation. Rather, they urge that the Court somehow misread the language that they read to the Court itself. The regulations promulgated by the Treasury Department permit the parties to look at alternatives to the mutually

satisfactory provision. Well, if they were to hire an independent trustee, as the plaintiffs would urge, the trustee is still bound by the contract language that both parties, including these plaintiffs through their agent, the union, negotiated. And that trustee, on his fiduciary duty basis, is also bound by the very same language.

For understandable reasons, the plaintiffs seek to distinguish Hlinka, Dzinglski and Hickman versus Tosco. Your Honor, the distinctions are inconsequential. The American philosopher William James said, there is no difference that doesn't make a difference. And we can all agree that the plaintiffs have different names, that they may have had different jobs. But in Hlinka, you have the same contract language, and you have the very same principles of fact and law that was in fact addressed by the Third Circuit, by the district court initially,

which granted summary judgment. And that was affirmed on appeal.

Now, the plaintiffs would like the Court to apply Shaw versus NVF. Unfortunately, Shaw versus NVF was reversed on appeal summarily. And we cited that in our brief.

When we get down to the final analysis, where is the discrimination? On one hand they say we should be treated like salaried employees. On the other hand they don't recognize in any way, shape or form that they are not salaried employees, that they are not employees at will, that they do in fact have the protections of a collective bargaining agreement. Unfortunately, they don't like those protections either. They also don't recognize that when the salaried employees went through the reductions in force -- and by that I mean permanent reductions -- they couldn't come back anymore. They were off the yo-yo, all right. They

didn't have a job. When they didn't come back to work, there wasn't work available. Now there is work available. The conditions are altogether different. As Mr. Whaley's affidavit makes clear, not only have all the bargaining units who had recall rights been called back, but the company is hiring off the street, hiring new people because it's a different enviroment than it was when the earlier applications were made.

The bottom line here, Your Honor, we suggest, is that when you do compare likes and likes, when you compare what the company did with respect to a permanent reduction and bargaining unit positions, 70/80 pensions were in fact grandted. These plaintiffs do not allege to the Court, do not assert in any way, shape or form that their jobs were going to be permanently eliminated. As a consequence, we don't have like circumstances.

Thank you, Your Honor.

THE COURT: Very well, I am ready to rule. The Court wishes to congratulate you, Mr. Efron, You have raised an ingenious argument, one that captured the fancy of the Court. Unfortunately, the Court cannot follow to its complete conclusion the position you advocate. I just have to recognize that the cited cases go against you in ultimate disposition rather than support your position.

I am clearly of a mind that the mutuality provision governs and that, unfortunately for your position, it governs against you. So I am going to grant the motion for summary judgment with prejudice against the defendant and deny the plaintiffs' motion for partial summary judgment.

I will ask --

MR. ERICKSON: Excuse me, Your Honor. Did you mean --

THE COURT: What did I say?

MR. ERICKSON: Plaintiffs.

THE COURT: I am going to grant defendants' motion for summary judgment and dismiss the case with prejudice. I said it wrong. All right.

And so that the record will then reflect what I intended, I am going to deny the plaintiffs' motion for partial summary judgment.

Are there any questions? Very well. I'll ask the defendant to prepare the Court's order.

United Stated Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-5102MN

ROBERT M. ADAMS,	*	
EDWARD A. ALTO,	*	
PAUL O. ARNSON,	*	
ALLAN L. DECENT,	*	
DONALD J. FORTE,	*	
DONALD C. FOSTER,	*	
LOUIS T. GAMBUCCI,	*	
JOSEPH L. GILLILAND,	*	
WAYNE M. GUNDERSON,	*	
MARLYN R. GRUNWALD,	*	
MELVIN L. HALLIDAY,	*	
GEORGE J. HILL,	*	Appeal from
LEONARD W. HOTAKAINEN,	*	the United
RAYMOND R. HOTAKAINEN,	*	States District
MARK D. JACKSON,	*	Court for the
WALTER E. JOHNSON,	*	District of
ROBERT J. JORGENSON,	*	Minnesota.
ROBERT KAROLEVITZ,	*	
DANIEL J. KEDROWSKI,	*	
EUGENE F. KEDROWSKI,	*	
ROBERT A. KLUNE,	*	
GARY L. KOPP,	*	
JOHN E. KOVATOVICH,	*	
LAWRENCE J. LENK,	*	
ROBERT V. MAGNUSON,	*	
CLIFFORD D. MANN,	*	
CARLYLE J. MATHSON,	*	
LEO L. MATTESON,	*	
MILNE C. MILTZ,	*	
DONALD T. MOGEN,	*	
JOHN V. MONSON,	*	
ALDEN MONSRUD,	*	
DALE K. OLSON,	*	
PAUL PALO,	*	
DAVID E. PATROW,	*	
EUGENE P. PETERSON,	*	
PAUL P. PLESHA,	*	

LARRY POWELL,	*
NORMAN T. PRATT,	*
WILLIAM A. PROUT,	*
ROBERT W. PULKINEN,	*
DWIGHT F. ROBISON,	*
ARNOLD M. RUDOLPH,	*
ALLAN E. SCOTT,	*
WESLEY E. SHOSTEDT,	*
LEONARD L. SOUDER,	*
LEO J. SVIR,	*
DAVID G. SWENSON,	*
LAWRENCE TAHIJA,	*
ANTHONY R. TURK,	*
DONALD A. TYSSEDAL,	*
DONALD R. VEEDER,	*
	*
APPELLANTS,	*
	*
v.	*
	*
LTV STEEL MINING	*
COMPANY, ORE MINING	*
COMPANIES PENSION	*
PLAN AND PENSION	*
COMMITTEE, ORE MINING	*
COMPANIES PENSION PLAN,	*
	*
APPELLEES.	*

Filed: August 05 1991
Francis E. Dosal, Clerk

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 13, 1991

The appellees shall recover from the appellants the sum of $109.20 as taxable costs on appeal.

A true copy.
ATTEST: /s/ Michael E. Gais,
Acting Clerk

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 8/2/91

United Stated Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-5102MN

ROBERT M. ADAMS, et al.,	*	
	*	
APPELLANTS,	*	Appeal from
	*	the United
vs.	*	States District
	*	Court for the
LTV STEEL MINING	*	District of
COMPANY, et al.,	*	Minnesota.
	*	
APPELLEES.	*	

Appellant's petition for rehearing has been considered by the Court and is denied.

July 26, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gais

Clerk, U.S. Court of Appeals, Eighth Circuit

29 U.S.C. § 141. Short title--Declaration of policy

(a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures

for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. § 157];

...

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities

by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the sound-

ness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) **Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries.** It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by

requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to

meet minimum standards of funding, and by requiring plan termination insurance.

Note: balance of 29 U.S.C. §§ 1001-1461 omitted except as specifically cited in Table of Authorities

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond;

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which--

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee

organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(g) **Decrease of accrued benefits through amendment of plan.** (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or 4281 [29 U.S.C. § 1082(c)(8) or 1441].

(2) For purposes of paragraph (1), a plan amendment which has the effect of--

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a partici-

pant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

...

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circum-

stances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

29 U.S.C. § 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 U.S.C. § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 U.S.C.

§ 1132] shall be applicable in the enforcement of this section.

Treas. Reg. § 1.411(d)-4. Section 411(d)(6) [29 U.S.C. § 1054(g)] protected benefits.--

Q-1: What are "section 411(d)(6) protected benefits"?

A-1: (a) **In general.** The term "section 411(d)(6) protected benefit" includes any benefit that is described in one or more of the following categories--

(1) benefits described in section 411(d)(6)(A),

(2) early retirement benefits and retirement-type subsidies described in section 411(d)(6)(B)(i), including qualified social security supplements as defined in § 1.401(a)(4)-12(q), and ...

Such benefits, to the extent they have accrued, are subject to the protection of section 411(d)(6) and, where applicable, the definitely determinable requirement of section 401(a) (including section 401(a)(25)) and cannot, therefore, be reduced, eliminated, or made subject to employer

discretion except to the extent permitted by regulations. ...

(c) **Plan terms--**(1) **General rule.** Generally, benefits described in section 411(d)(6)(A), early retirement benefits, retirement-type subsidies, and optional forms of benefit are section 411(d)(6) protected benefits only if they are provided under the terms of a plan. ...

(d) **Benefits that are not section 411(d)(6) protected benefits.** The following benefits are examples of items that are not section 411(d)(6) protected benefits: (1) ancillary life insurance protection; (2) accident or health insurance benefits; (3) social security supplements described in section 411(a)(9), except qualified social security supplements as defined in § 1.401(a)(4)-12; (4) the availability of loans (other than the distribution of an employee's accrued benefit upon default under a loan); (5) the right to make after-tax employee

contributions or elective deferrals described in section 402(g)(3); (6) the right to direct investments; (7) the right to a particular form of investment (e.g., investment in employer stock or securities or investment in certain types of securities, commercial paper, or other investment media); (8) the allocation dates for contributions, forfeitures, and earnings, the time for making contributions (but not the conditions for receiving an allocation of contributions or forfeitures for a plan year after such conditions have been satisfied), and the valuation dates for account balances; (9) administrative procedures for distributing benefits, such as provisions relating to the particular dates on which notices are given and by which elections must be made; and (10) rights that derive from administrative and operational provisions, such as mechanical procedures for allocating

investment experience among accounts in defined contribution plans.

Q-2: To what extent may section 411(d)(6) protected benefits under a plan be reduced or eliminated?

A-2: (a) **Reduction or elimination of section 411(d)(6) protected benefits--** (1) **In general.** A plan may not be amended to eliminate or reduce a section 411(d)(6) protected benefit that has already accrued, except as provided in sections 412(c)(8) and 4281, and in paragraph (b) of this Q&A-2. This is generally the case even if such elimination or reduction is contingent upon the employee's consent. However, a plan may be amended to eliminate or reduce section 411(d)(6) protected benefits with respect to benefits not yet accrued as of the later of the amendment's adoption date or effective date without violating section 411(d)(6).

...

(b) **Section 411(d)(6) protected benefits that may be eliminated or reduced only as permitted by the Commissioner--** (1) **In general.** The Commissioner may, consistent with the provisions of this section, provide for the elimination or reduction of section 411(d)(6) protected benefits that have already accrued only to the extent that such elimination or reduction does not result in the loss to plan participants of either a valuable right or an employer-subsidized optional form of benefit where a similar optional form of benefit with a comparable subsidy is not provided or to the extent such elimination or reduction is necessary to permit compliance with other requirements of section 401(a) (e.g., sections 401(a)(4), 401(a)(9) and 415). The Commissioner may exercise this authority only through the publication of revenue rulings, notices, and other documents of general applicability.

(2) **Section 411(d)(6) protected benefits that may be eliminated or reduced.** The elimination or reduction of certain section 411(d)(6) protected benefits that have already accrued in the following situations does not violate section 411(d)(6). The rules with respect to permissible eliminations and reductions provided in this paragraph (b)(2) are effective January 30, 1986. These exceptions create no inference with respect to whether any other applicable requirements are satisfied (for example, requirements imposed by section 401(a)(9) and section 401(a)(14)).

(i) **Change in statutory requirement.** A plan may be amended to eliminate or reduce a section 411(d)(6) protected benefit if the following three requirements are met: the amendment constitutes timely compliance with a change in law affecting plan qualification; there is an exercise of section

7805(b) relief by the Commissioner; and the elimination or reduction is made only to the extent necessary to enable the plan to continue to satisfy the requirements for qualified plans. In general, the elimination or reduction of a section 411(d)(6) protected benefit will not be treated as necessary if it is possible through other modifications to the plan (e.g., by expanding the availability of an optional form of benefit to additional employees) to satisfy the applicable qualification requirement.

...

Q-4: May a plan provide that the employer may, through the exercise of discretion, deny a participant a section 411(d)(6) protected benefit for which the participant is otherwise eligible?

A-4: (a) **In general.** Except as provided in paragraph (d) of Q&A-2 of this section with respect to certain employee stock ownership plans, a plan that permits

the employer, either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible (but for the employer's exercise of discretion) violates the requirements of section 411(d)(6). A plan provision that makes a section 411(d)(6) protected benefit available only to those employees as the employer may designate is within the scope of this prohibition. Thus, for example, a plan provision under which only employees who are designated by the employer are eligible to receive a subsidized early retirement benefit constitutes an impermissible provision under section 411(d)(6). In addition, a pension plan that permits employer discretion to deny the availability of a section 411(d)(6) protected benefit violates the definitely determinable requirement of section 401(a), including section

401(a)(25). See § 1.401-1(b)(1)(i). This is the result even if the plan specifically limits the employer's discretion to choosing among section 411(d)(6) protected benefits, including optional forms of benefit, that are actuarially equivalent.

...

(b) **Exception for administrative discretion.** A plan may permit limited discretion with respect to the ministerial or mechanical administration of the plan, including the application of objective plan criteria specifically set forth in the plan. Such plan provisions do not violate the requirements of section 411(d)(6) or the definitely determinable requirement of section 401(a), including section 401(a)(25). For example, these requirements are not violated by the following provisions that permit limited administrative discretion: (1) commencement of benefit payments as soon as administratively feasible after a stated

date or event; (2) employer authority to determine whether objective criteria specified in the plan (e.g., objective criteria designed to identify those employees with a heavy and immediate financial need or objective criteria designed to determine whether an employee has a permanent and total disability) have been satisfied; and (3) employer authority to determine, pursuant to specific guidelines set forth in the plan, whether the participant or spouse is dead or cannot be located.

...

Q-6: May a plan condition the availability of a section 411(d)(6) protected benefit on the satisfaction of objective conditions that are specifically set forth in the plan?

A-6: (a) **Certain objective conditions permissible--**(1) **In general.** The availability of a section 411(d)(6) protected benefit may be limited to employees

who satisfy certain objective conditions provided the conditions are ascertainable, clearly set forth in the plan and not subject to the employer's discretion except to the extent reasonably necessary to determine whether the objective conditions have been met. Also, the availability of the section 411(d)(6) protected benefit must meet the nondiscrimination requirements of section 401(a)(4). See § 1.401(a)-4.

...

Q-9: What are the applicable effective date rules for purposes of this section?

A-9: (a) **General effective date.** Except as otherwise provided in this section, the provisions of this section are effective January 30, 1986.

...

(c) **Existing plans--** ...

(3) **Existing collectively bargained plans.** With respect to existing

collectively bargained plans this section is effective for the later of the first day of the first plan year commencing on or after January 1, 1989, or the first day of the first plan year that the requirement of section 410(b) as amended by TRA '86 apply to such plan.

...

(d) **Delayed effective date not applicable to new alternatives or conditions--**(1) **In general.** The delayed effective dates in paragraphs (c)(2) and (c)(3) of this Q&A-9 for existing plans are only applicable with respect to a section 411(d)(6) protected benefit if both the section 411(d)(6) protected benefit and the condition providing employer discretion as to the availability of such benefit are both adopted and in effect prior to August 1, 1986. If the preceding sentence is not satisfied with respect to a particular section 411(d)(6) protected benefit, this section is

effective with respect to such section 411(d)(6) protected benefit as if the plan were a new plan.

(2) **Addition of discretion on or after January 30, 1986.** The delayed effective dates in paragraphs (c)(2) and (c)(3) of this Q&A-9 are not available with respect to any section 411(d)(6) protected benefit if the section 411(d)(6) protected benefit was provided for in the plan prior to January 30, 1986, and the availability of such benefit was made subject to the exercise of employer discretion on or after January 30, 1986. If the conditions set forth in this paragraph are not satisfied with respect to a particular section 411(d)(6) protected benefit, this section is effective with respect to such section 411(d)(6) protected benefit as if the plan were a new plan. A limited exception is provided with respect to existing plans that provided a particular section 411(d)(6)

protected benefit prior to January 30, 1986, and then amended the plan after January 30, 1986, and before August 1, 1986, to add a provision for employer discretion with respect to the availability of such benefit. Such plans are required to have been amended retroactively by December 31, 1987, to remove such provision for employer discretion, and, if the benefit made subject to such discretion was subsequently eliminated, the plan is required to have been further amended, by the same date, to retroactively reinstate the benefit.

(3) **Exception for certain amendments covered by a favorable determination letter.** If an amendment adding a section 411(d)(6) protected benefit subject to employer discretion was adopted or made effective after August 1, 1986, and the plan receives a favorable determination letter covering such provision with respect to an application for such

letter made prior to July 11, 1988, then the effective date for purposes of amending such provision under the transitional rules is the applicable effective date determined under the rules with respect to existing plans.

(3)

91-866

No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1991

ROBERT M. ADAMS, ET AL.,

Petitioners,

v.

LTV STEEL MINING COMPANY,
ORE MINING COMPANIES PENSION PLAN
AND PENSION COMMITTEE,
ORE MINING COMPANIES PENSION PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Raymond L. Erickson*
Richard J. Leighton
HANFT, FRIDE, O'BRIEN, HARRIES,
SWELBAR & BURNS, P.A.
1000 First Bank Place
130 West Superior Street
Duluth, Minnesota 55802-2094
(218) 722-4766

Counsel for Respondents

*Counsel of Record

1991 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518
■ FAX 612-337-8053

QUESTIONS PRESENTED FOR REVIEW

1. Did the Employer or the Pension Committee violate the Employee Retirement Income Security Act [hereinafter "ERISA"] by informally or formally amending the pension plan with respect to the provision of early retirement benefits?

2. Did the Employer or the Pension Committee breach any fiduciary duties, in violation of 29 U.S.C. § 1104(a)(1) of ERISA, by denying the requests of certain bargaining unit employees for early retirement benefits when the benefits were not in the mutual interests of the applicants and the employer as required by the pension plan?

3. Did the Employer or the Pension Committee discriminate against certain bargaining unit employees, in violation

of 29 U.S.C. § 1140 of ERISA, by denying the requests of those employees for early retirement benefits?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW.....	1
TABLE OF AUTHORITIES.....	5
STATEMENT OF THE CASE.....	8
REASONS FOR DENYING THE PETITION.....	25
Introduction.....	25
I. Neither the Employer nor the Pension Committee violated ERISA by informally or formally amending the Pension Plan with respect to the provision of early retirement benefits.....	29
II. Neither the Employer nor the Pension Committee breached any fiduciary duties in violation of 29 U.S.C. § 1104(a)(1) of ERISA, by denying the requests of certain bargaining unit employees for early retirement benefits when the benefits were not in the mutual interests of the applicants and the	



employer as required by the Pension Plan..... 38

III. Neither the Employer nor the Pension Committee discriminated against the Petitioners, in violation of 29 U.S.C. § 1140 of ERISA, by denying the requests of the Petitioners for early retirement benefits... 42

Conclusion..... 48

TABLE OF AUTHORITIES

	Page
Statutory Provisions Involved:	
26 U.S.C. § 401(a).....	35
29 U.S.C. § 1054(g).....	30, 31, 36
29 U.S.C. § 1104(a)(1)...	1, 38
29 U.S.C. § 1140.....	1, 43 44, 46, 47
Treas. Reg. § 1.411(d)-4, Q&A 2.....	34
Treas. Reg. § 1.411(d)-4, Q&A-8(b).....	35
Treas. Reg. § 1.411(d)-4, Q&A-9(c)(3).....	31
U.S. Supreme Court Cases:	
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).....	48
Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....	48
Federal Cases:	
Adams v. LTV Steel Mining Co., 936 F.2d 368 (8th Cir. 1991)...	26
Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516 (3rd Cir. 1988), cert. denied, 490 U.S. 1105 (1989).....	31

Baker v. Kaiser Aluminum & Chem. Corp., 608 F.Supp. 1315, (N.D.Calif. 1984)..... 47
Berger v. Edgewater Steel Co., 911 F.2d 911 (3rd Cir.) cert. denied, 111 S.Ct. 1310 (1991). 25, 26, 36, 41
Corum v. Farm Credit Services, 628 F.Supp. 707 (D.Minn. 1986). 47
Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988)... 45
Dockray v. Phelps Dodge, 801 F.2d 1149 (9th Cir. 1986)..... 28
Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir.) cert. denied, 110 S.Ct. 281 (1989).. 25, 26, 41
Fletcher v. Kroger Co., 942 F.2d 1137 (7th Cir. 1991)..... 26, 37, 41
Gavalik v. Continental Can Co., 812 F.2d 564 (8th Cir. 1988)... 45, 46
Hickman v. Tosco Corporation, 840 F.2d 564 (8th Cir. 1988)... 40
Hlinka v. Bethlehem Steel, 863 F.2d 279 (3rd Cir. 1988)..... 25
Nash by Nash v. Krivaja Beechbrook Corp., 866 F.2d 1053 (8th Cir. 1989)..... 42
Titsch v. Reliance Group, Inc., 548 F.Supp. 983 (S.D.N.Y. 1982) aff'd mem., 742 F.2d 1441 (2nd Cir. 1983)..... 45
Varhola v. Doe, 820 F.2d 809 (6th Cir. 1987)..... 46
West v. Butler, 621 F.2d 240 (6th Cir. 1980)..... 44

Miscellaneous:

Revenue Ruling 85-6,
1985-1 C.B. 133..... 31
Rule 10 of the Rules of the
United States Supreme Court.... 25, 27, 49
Senate Report No. 98-575..... 32

STATEMENT OF THE CASE

All of the claims of the Petitioners arise from the "70/80 Retirement" provisions of Paragraph 2.6(d) of the Ore Mining Companies Pension Plan ("Pension Plan"). Paragraph 2.6(d) provided as follows:

> Any Participant who has not attained the age of 62 years and who shall have had at least 15 years of Continuous Service and (i) shall have attained the age of 55 years and whose combined age and years of Continuous Service shall equal 70 or more, or (ii) whose combined age and years of Continuous Service shall equal 80 or more, and
>
> * * *
>
> (d) who considers that it would be in his interest to retire, and his Employing Company considers that such retirement would likewise be in its interest and, by applying like rules in a non-discriminatory manner to like or similar

> circumstances, approves an application for retirement under mutually satisfactory conditions,
>
> shall be eligible to retire on or after April 1, 1986 and shall upon his retirement (hereinafter "70/80 retirement") be eligible for a pension.

As a consequence of this provision, those Petitioners whose combined age and years of Continuous Service equaled 70 or 80 or more could apply for an early retirement and, if such a retirement was also in the interests of the Employing Company [i.e., LTV Steel Mining Company], the retirement would be given.

The provisions of the Pension Plan were secured through negotiations between the Employing Company and the United Steelworkers of America [sometimes hereinafter "Union"], which is and was the recognized bargaining agent of the

Petitioners. As provided in the Pension Plan, a 70/80 mutually satisfactory retirement would entitle the recipient to full retirement benefits, that is, the benefits would not be actuarially reduced from the benefits which would otherwise be available from a normal retirement which would be awarded after at least 30 years of service. In addition, the 70/80 mutually satisfactory retirement would award a $400 increment to be paid on a monthly basis so as to provide the retiree with a "bridge" until the retiree should reach the age of 62 and thereby be qualified to receive Social Security benefits. For obvious reasons, this type of early retirement provided a substantial inducement for an employee to retire prior to his having accumulated 30 years of service. The 70/80 mutually

satisfactory retirement has also served as a useful tool for the Employing Company in the reorganization of the salaried work force at Erie Mining Company/LTV Steel Mining Company.

At all pertinent times, Pickands Mather & Co. has been the Managing Agent for Erie Mining Company which, in the spring of 1986, was wholly acquired by LTV Steel Company, Inc., when LTV Steel purchased the ownership interests in Erie Mining Company which had previously been held by three other steel companies. Following the acquisition of Erie Mining Company, LTV Steel changed the name of that operation to LTV Steel Mining Company [hereinafter the "Employing Company" or the "Company"] but continued to contract with Pickands Mather to provide services as a managing agent.

Following the acquisition of Erie Mining Company, LTV Steel assumed a greater responsibility and involvement in matters of industrial relations and employee benefits, including pension benefits. At about the time of this acquisition, the productive capacity of the taconite plant was downsized from 7 million tons of taconite pellets to 6 million tons.

Throughout the early 1980's, as Erie Mining Company and the entirety of the taconite mining industry were being devastated by a weak market for taconite pellets, the Employing Company, and its managing agent, sought to economize and restructure its salaried work force so as to remain economically viable. Through terminations, transfers in employment, natural attrition, and retirements, Erie Mining Company's salaried work force was

permanently reduced from approximately 800 to 200 employees. Part of this permanent reduction in salaried employee job positions was accomplished through the award of 70/80 mutually satisfactory retirements. The granting of such retirements to the salaried work force was in the interests of the Employing Company since the Company's salaried payroll would be permanently reduced during future operations which, in turn, would produce a reduction in future operating expenses and greater operating efficiencies. The permanent reductions in the number and in the types of job positions in the salaried work force was facilitated by the salaried employees having an employee-at-will relationship with the Company.

On the other hand, the bargaining unit employees, including all of the Petitioners, had an employment contract which had been negotiated by the Employing Company and the United Steelworkers of America, and which provided job security that was not available to the salaried work force. As a consequence of the employment contract, the Company was not able to unilaterally and permanently remove job positions from the bargaining unit without the agreement of the Union. While the Company was authorized by the collective bargaining agreement to lay off bargaining unit employees during times of low production, those layoffs were governed by the seniority provisions of the collective bargaining agreement which provided

greater job security to those employees having greater seniority.

During the same period of time that Erie Mining Company was permanently reducing its salaried work force, negotiations were underway to permanently reduce the bargaining unit job positions, but those negotiations were not successful. Although there would be an understandable interest in the Company to permanently reduce its work force and, therefore, its payroll expense, the award of a 70/80 pension to an employee which did not produce a permanent reduction in job positions or classifications would be contrary to the interests of the Company. Since the Pension Plan was solely funded by the Employing Company, the award of a 70/80 mutually satisfactory retirement would be an additional expense to the

Company in and of itself. Additionally, if the 70/80 retirement did not produce a permanent reduction in job positions, the retiring employee would have to be replaced by a new employee, which would generate production inefficiencies until the new employee should become fully trained and experienced in his job assignments.

Moreover, the training of the new employee, both the task training and the extensive training required by the regulations of the Mine Safety and Health Administration [MSHA], also would increase the expenses of the Company if the 70/80 retirement did not produce a permanent reduction in jobs. Since the new employee would be covered by the Pension Plan, the Company's health and life insurance plans, and would be

entitled to other employee benefits, there would be further increased expenses to the Company. Consequently, rather than reducing the Company's work force expense, the granting of a 70/80 in circumstances which did not produce a permanent reduction in job positions, would merely increase the work force liability of the Company in order to produce the same or less product until the new employee was fully trained and experienced. Under such circumstances, the use of 70/80 mutually satisfactory retirements would not be an exercise of good business judgment because permanent reductions in job positions in the work force would not be accomplished. Moreover, despite the fact that the Pension Plan was overfunded, the granting of the requested early retirements would

adversely affect the operation of LTV Steel Mining Company, and if extended plant-wide to all employees solely on the basis of age and service, the effect would devastate the Company's ability to competitively operate.

As noted, during the 1980's, Erie Mining Company did successfully and permanently reduce its salaried work force in part through the granting of 70/80 mutually satisfactory retirements. During the same period of time, the Company was able to negotiate the permanent reduction in two classified jobs in the bargaining unit, as to which two 70/80 mutually satisfactory pensions

were awarded to the retirees.[1] As was true with the permanent salaried reductions, such permanent reductions in the job positions of the bargaining unit work force were consistent with good business judgment and were in the interests of the Company. When confronted with "like or similar circumstances", namely, a permanent reduction in the job positions in the work force, the Pension Committee has awarded 70/80 mutually satisfactory retirements to the bargaining unit. As a consequence of the Labor Management Relations Act, the permanent elimination

[1]Petitioners suggest that these reductions were not permanent, but the Affidavit evidence of the Respondents that these reductions were permanent was unrebutted.

of bargaining unit classified jobs requires the involvement and agreement of the collective bargaining agent. In this case, the 70/80 mutually satisfactory pensions that were awarded to the bargaining unit in 1987 had received the approval of the collective bargaining agent.

With respect to the claims of the Petitioners for 70/80 mutually satisfactory retirements, no concurrent reductions in the work force had been agreed to by the Company and the Union and, indeed, LTV Steel Mining Company was expanding its bargaining unit work force during the period in which the Petitioners' applications for 70/80 retirements were made. At the time that the 70/80 retirements were requested in 1987, LTV Steel Mining Company had called

back the bargaining unit employees who had been on layoff and was hiring additional bargaining unit employees "off the street."[2] In contrast, during the period from 1982 to 1986, when certain salaried employees were granted 70/80 retirements, Erie Mining Company was eliminating salaried jobs and was not in a "hiring mode" for salaried personnel. When the Company was hiring bargaining unit employees, there was no hiring of

[2]Through a series of assumptions drawn from exhibits proffered by the Petitioners that are not self-explanatory, Petitioners imply that the Employing Company's bargaining unit work force was not expanding. Not withstanding such baseless assumptions, the Respondents' Affidavit evidence in support of their Motion for Summary Judgment was uncontroverted that the Employing Company was hiring additional bargaining unit employees off the street at the time that Petitioners were seeking early retirement.

salaried employees. Notably, the Union did not grieve or otherwise contest the denial of the 70/80 mutually satisfactory retirements to the Petitioners, although the Union was requested to do so by the Petitioners, because the Company's actions were entirely consistent with the underlying agreement of the Company and the Union.

Finally, in Paragraph 13 of Petitioners' First Amended Complaint, Petitioners allege that on December 31, 1987, without any notice to the Petitioners or the United Steelworkers, the Respondents "unilaterally" amended the Pension Plan, "without the consent of the Steelworkers", by eliminating 70/80 retirements under the mutually satisfactory conditions requirement. This allegation has never been

subsequently modified or amended even though Respondents had attached to their original Answer and to their Answer to Petitioners' First Amended Complaint the written agreement of the Steelworkers and the Employing Company which expressly authorized the elimination of the pertinent 70/80 retirements effective January 1, 1989. Had the Company and the Steelworkers failed to secure such an agreement, the Pension Plan could have lost its favorable tax treatment status. Despite their attempt to do so, the Employing Company and the Steelworkers were not able to devise any amendment to the discretionary language in Paragraph 2.6(d) other than the elimination of that language. By the agreement of the Company and the Steelworkers, that amendment would be formally adopted with

an effective date of January 1, 1989. In the interim, and with the consent of the United Steelworkers, the Plan has been administered since January 1, 1989 with the mutually satisfactory provision deleted. Petitioners have never joined or attempted to join the United Steelworkers as a party to the action below.

REASONS FOR DENYING THE PETITION

Introduction

Understandably, in expressing the reasons for granting their Petition, Petitioners ignore the criteria addressed in Rule 10 of this Court's Rules. Those criteria reflect the character of the reasons that the Court will consider in exercising its discretion to review on a Writ of Certiorari. In contrast to those criteria, here there is no conflict in the decisions of the Courts of Appeals which have considered issues arising from similarly worded 70/80 early retirement provisions or other early retirement programs. See, Hlinka v. Bethlehem Steel, 863 F.2d 279 (3rd Cir. 1988); Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir.) cert. denied 110 S.Ct. 281 (1989); Berger v. Edgewater

Steel Co., 911 F.2d 911 (3rd Cir. 1990) cert. denied 111 S.Ct. 1310 (1991); Adams v. LTV Steel Mining Co., 936 F.2d 368 (8th Cir. 1991); and Fletcher v. Kroger Co., 942 F.2d 1137 (7th Cir. 1991). Moreover, the holdings of these Courts of Appeals are not in conflict with any decisions of this Court, nor do Petitioners point to any such conflict. Indeed, this Court has previously considered the same or nearly the same arguments that the Petitioners advance here and has consistently denied certiorari. See, Berger v. Edgewater Steel Co., supra, and, Dzinglski v. Weirton Steel Corp., supra. Petitioners do not claim, nor is there any basis for them to claim, that the Court of Appeals below departed from the accepted and usual course of judicial proceedings nor

do they provide any basis to believe that an important question of Federal law is raised by their Petition which should be settled by this Court. Although Petitioners clearly dislike the holdings of the United States Courts of Appeals in the Third, Fourth, Seventh and Eighth Circuits, the only arguments they advance as an expression of their dislike are contained in concurring or dissenting opinions which failed to secure majority support in any Circuit. In the absence of a compelling argument that any of the criteria of Rule 10 warrant the granting of their Petition, Petitioners take unwarranted liberties in criticizing the

decisions of the Trial Court and the Court of Appeals below.[3]

[3]Without attempting to exhaust the examples, the following reflect the excessive bounds of Petitioner's advocacy. In Footnote 1 to their Petition, Petitioners accuse the Court of Appeals of a misstatement of fact. As the most cursory review of the evidence in this record confirms, the quoted language in that footnote contains no misstatement of fact. Indeed, despite the uncontradicted evidence in the record, Petitioners continue to allege that no agreement had been reached by the Employing Company and the Union to amend the Plan to eliminate Subsection 2.6(d).

In Footnote 2 to their Petition, Petitioners seek to undermine the authorities which support the "dual capacity" doctrine and which recognize that an employer for business reasons may make decisions which are not subject to fiduciary principles. At no time in these proceedings, however, have the Petitioners cited any decisional authority which has considered the dual capacity doctrine and rejected the same. Petitioners' citation of Dockray v. Phelps Dodge, 801 F.2d 1149 (9th Cir. 1986), on page 18 of their Petition, is a case in point as the Court there neither

(Footnote Continued)

I.

Neither the Employer nor the Pension Committee violated ERISA by informally or formally amending the Pension Plan with respect to the provision of early retirement benefits.

(Footnote Continued)
considered nor addressed the dual capacity doctrine.

On page 19 of their Petition, Petitioners argue that it "is undisputed * * * that the employer did not apply [its decision to deny early retirement without a permanent reduction in the work force] as a 'guideline'." The contention is without evidentiary support. When faced with like circumstances involving permanent reductions in the work force, early retirements were granted to hourly and salaried employees alike. While Petitioners seek to discredit the holdings of the Trial Court and the Court of Appeals that early retirements were given to hourly employees, there is no evidence in this record to contest those holdings. Other examples of the Petitioners' abounding advocacy will be addressed in subsequent sections of this Brief.

In arguing that the Court of Appeals' decision in this case "emasculates" the provisions of the Retirement Equity Act of 1984, 29 U.S.C. § 1054(g)(2), Petitioners embark on an exercise in fatigue failure. During their arguments in favor of summary judgment before the Trial Court below, Petitioners argued that the Treasury Regulations promulgated pursuant to § 1054(g) entirely supported their position. Having failed to so persuade the Trial Court, on appeal the Petitioners argued that the same Treasury Regulations were ultra vires and therefore null and void. The Court of Appeals having rejected the Petitioners' argument on those grounds, Petitioners now return to argue that the Treasury

Regulations, or at least some of them, are supportive of their concerns.[4]

In point of fact, when not taken out of context and when read in conjunction with the legislative history of § 1054(g), Congress' intent to permit amendments to pension plans is clear

[4]Contrary to Petitioners' contention that the Treasury Regulations were applicable to the Pension Plan in this case prior to the denial of their early retirement applications in 1987, the Regulations expressly provided that they were not applicable to an existing collectively-bargained plan until Jan. 1, 1989. Treas. Reg. § 1.411(d)-4, Q&A-9(c)(3). In any event, the Regulations support the Respondents' actions in amending the Plan when they did. See infra at 33-36. Moreover, prior rulings of the Treasury Department and appellate courts further support the position that Respondents' actions did not violate § 1054(g). See Rev. Rul. 85-6, 1985-1 C.B. 133; Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516, 1527-28 & n. 12 (3rd Cir. 1988), cert. denied, 490 U.S. 1105 (1989).

where those amendments are to eliminate early retirement benefits which, if left unaltered, would result in the loss of the tax qualified status of the Pension Plan. Senate Report No. 98-575 provides in pertinent part:

> Also, the committee expects that Treasury regulations will permit participants to elect to reduce accrued benefits in a defined benefit pension plan where those benefits would otherwise exceed the overall limits on contributions and benefits (sec. 415 of the Code) or cause prohibited discrimination under the plan. [1984-2C.B. 447,471, Emphasis supplied].

The same Senate Report went on to state:

> Under the bill, to the extent provided by Treasury Regulations, a benefit option may be eliminated with respect to benefits accrued before the date the amendment is adopted. The committee expects that, for example, the elimination of an option with respect to previously accrued benefits is not to be prohibited by a plan

> amendment to the extent the elimination of the option is required as a condition of meeting the standards for qualified status of the plan.
>
> The Regulations also could permit the elimination of an option if (1) the elimination of the option does not eliminate a valuable right of a participant or beneficiary and, (2) the option is not subsidized or a similar benefit with a comparable subsidy is provided. [Id. Emphasis supplied].

Obviously, the Senate Report reflects the intention of Congress that the Treasury Department promulgate regulations which would preserve the tax qualified status of pension plans through the deletion of optional early retirement benefits that contain elements of employer discretion.

Moreover, Petitioners have never contested the fact that the literal language of the Treasury Regulations permits the elimination of early

retirement benefits in order to preserve the qualified tax status of a pension plan. For example, Treasury Regulation § 1.411(d)-4, Q&A 2 provides in pertinent part:

> A plan may not be amended to eliminate or reduce a Section 411(d)(6) protected benefit that has already accrued, except as provided in Sections 412(c)(8) and 4281, and in paragraph (b) of this Q&A 2.
>
> * * *
>
> (b) Section 411(d)(6) protected benefits that may be eliminated or reduced only as permitted by the Commissioner--(1) In general. The Commissioner may, consistent with the provisions of this Section, provide for the elimination or reduction of Section 411(d)(6) protected benefits that have already accrued only to the extent that such elimination or reduction does not result in a loss to plan participants of either a valuable right or an employer subsidized form of benefit where a similar optional form of benefit with a comparable subsidy is not provided or to

> the extent such elimination or reduction is necessary to permit compliance with other requirements of Section 401(a)(e.g., Sections 401(a)(4), 401(a)(9) and 415). * * * [Emphasis supplied].

Notably, Section 401(a), as referenced above, relates specifically to the tax qualified status of a pension plan. See, 26 U.S.C. § 401(a).

Nor have Petitioners ever contended that Respondents and the Petitioners' Union modified the Pension Plan in violation of the Treasury Regulations. In this respect, Treasury Regulation § 1.411(d)-4, Q&A-8(b) specifically provides in pertinent part as follows:

> If the availability of an optional form of benefit, early or late retirement benefit, or retirement-type subsidy under an existing plan is conditioned on the exercise of employer discretion, the plan must be amended either to eliminate the optional form of benefit, early

> or late retirement benefit, or retirement-type subsidy to make such benefit available to all participants without limitation, or to apply objective and nondiscriminatory conditions to the availability of the optional form of benefit, early or late retirement benefit, or retirement-type subsidy. [Emphasis supplied].

Both the Trial Court and the Court of Appeals below determined that the mutually-agreed upon amendment which Petitioners here contest was not in violation of 29 U.S.C. § 1054(g). And, while Petitioners dispute those holdings, they cite no contrary authorities. In point of fact, the holdings of the Trial Court and the Court of Appeals are consistent with the holdings and analysis of the United States Court of Appeals for the Third Circuit in Berger v. Edgewater Steel Co., supra, and cases cited therein

and of the United States Court of Appeals for the Seventh Circuit in Fletcher v. Kroger Co., supra.

Moreover, the Trial Court and the Court of Appeals rejected Petitioners' complaint that the Respondents informally amended the Pension Plan by refusing to grant Petitioners' request for early retirement. In point of fact, the pension provision at issue permits the Pension Committee to apply "like rules in a nondiscriminatory manner to like or similar circumstances." The evidence in this record is uncontested that when confronted with like or similar circumstances, namely the permanent reduction in job positions in the work force, early retirement benefits were granted to salaried and hourly employees alike. As the Court of Appeals noted,

this guideline did not amend the Pension Plan.

Neither the Employer nor the Pension Committee violated ERISA by informally or formally amending the Pension Plan with respect to the provision of early retirement benefits and the Petition for Certiorari should not be granted.

II.

Neither the Employer nor the Pension Committee breached any fiduciary duties in violation of 29 U.S.C. § 1104(a)(1) of ERISA, by denying the requests of certain bargaining unit employees for early retirement benefits when the benefits were not in the mutual interests of the applicants and the employer as required by the Pension Plan.

Although the Petitioners take issue with the "dual capacity" doctrine, they

cite no authority to contest its application in this case. The rationale for the doctrine was recently explained by the United States Court of Appeals for the Eighth Circuit, in a manner consistent with the rationale of the other Circuits which have addressed the issue, as follows:

> * * * [T]he ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets. Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986) (Phillips), aff'g 614 F.Supp. 694, 716-17 (N.D.Ala. 1985), cert. denied, --- U.S. ---, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987). ERISA does not require that "day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan

> participants." Phillips, 614 F.Supp. at 718, citing Sutton v. Weirton Steel Division of National Steel Corp., 567 F.Supp. 1184, 1200-01 (N.D.W.Va.), aff'd 724 F.2d 406, 411 (4th Cir. 1983), cert denied, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984). Accord, N.L.R.B. v. Amax Coal Co., 453 U.S. 332, 333-34, 101 S.Ct. 2789, 2796-97, 69 L.Ed.2d 672 (1981); Amato v. Western Union International, Inc., 773 F.2d 1402, 1416 (2d Cir. 1985), cert dismissed, 474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986); Dhayer v. Weirton Steel Division of National Steel Corp., 571 F.Supp. 316, 328-29 (N.D.W.Va.), aff'd sub nom. Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406, 411 (4th Cir. 1983), cert denied, 467 U.S. 1205, 104 S.Ct. 1287, 81 L.Ed.2d 345 (1984); Moehle, 649 F.Supp. at 779." Hickman v. Tosco Corporation, 840 F.2d 564, 566-67 (8th Cir. 1988).

The evidence before the Trial Court and the Court of Appeals supported only one conclusion, namely that the Employing Company was acting as an employer, and

not as a fiduciary, in deciding whether the Petitioners' retirements were in the Company's interest. The Petitioners cite no evidence in the record which is in conflict with the Court of Appeals' holding. Indeed, the Petitioners provide no argument that the granting of 70/80 retirements would have served any interest of the Employing Company. To the extent that Petitioners suggest that the Pension Committee should have disregarded the Employing Company's decision not to grant the early retirements, they cite no authority that such a decision could be made by the Pension Committee without breaching its fiduciary duties. Indeed, the case law is entirely to the contrary. See, Berger v. Edgewater Steel Co., supra; Dzinglski v. Weirton Steel Corp., supra,; Fletcher

v. Kroger Co., supra; and, Nash by Nash v. Krivaja Beechbrook Corp., 866 F.2d 1053, 1055 (8th Cir. 1989). The literal language of paragraph 2.6(d) vests in the Employing Company, and not in the Pension Committee or the Petitioners, the determination of what is in the Employing Company's interest. The Pension Committee was bound to adhere to the provisions of the Pension Plan.

Not having breached their fiduciary duties to the Petitioners, the Respondents did not violate ERISA and the Petition for a Writ of Certiorari should be denied.

III.

Neither the Employer nor the Pension Committee discriminated against the Petitioners, in violation of 29 U.S.C. § 1140 of ERISA, by denying the requests

of the Petitioners for early retirement benefits.

The Petitioners have not alleged, nor is there any evidence to support a contention, that one or more of the Petitioners was discharged, fined, suspended, expelled, disciplined or discriminated against because he applied for a 70/80 mutually satisfactory retirement. All that the Petitioners have asserted is that the denial of the benefit falls within the proscriptions of 29 U.S.C. § 1140. Notably, when Petitioners first addressed this issue they candidly acknowledged that they were not alleging "that any of [Respondents'] officials made any intentional or negligent misrepresentations concerning the availability of 70/80 pensions." Plaintiffs' Memorandum in Support of

Plaintiffs' Motion for Partial Summary Judgment at page 12 n. 11. Without any change in the evidentiary record, the Petitioners would have this Court believe that Respondents have engaged in some form of unscrupulous conduct. Mere name calling on the Petitioners' part, however, is an insufficient basis to invoke the provisions of § 1140.

In construing the prohibition of 29 U.S.C. § 1140, the Courts have uniformly recognized that this section was designed primarily to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980). An essential element of plaintiffs' proof under this statute is to show that an employer was at least in

part motivated by a specific intent to engage in activity prohibited by this section. Dister v. Continental Group, Inc., 859 F.2d 1108, 1111 (2nd Cir. 1988); Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3rd Cir.) cert denied, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987); and, Titsch v. Reliance Group, Inc., 548 F.Supp. 983, 985 (S.D.N.Y. 1982), aff'd mem., 742 F.2d 1441 (2nd Cir. 1983). Petitioners are unable to point to any evidence that Respondents deliberately discriminated against the Petitioners for the purpose of interfering with their rights under the applicable Pension Plan, for no such evidence exists. Notably, the United States Court of Appeals for the Sixth Circuit considered arguments which were identical to those that the Petitioners

have advanced here and rejected the same as follows:

> Plaintiffs offer little support for their contention that the District Court erred. They argue solely that while other Portsmouth employees, including coke oven employees [i.e., the same employment department as the plaintiffs], were allowed to retire with shutdown pensions, plaintiffs were required to work for New Boston and were denied such benefits. While that may not be fair we do not believe that it constitutes a discriminatory action under § 1140.
>
> Varhola v. Doe, 820 F.2d 809, 816 (6th Cir. 1987).

The Courts have consistently recognized that no ERISA cause of action lies when loss of pension benefits was a mere consequence of, but not a motivating factor behind an employment decision. See, e.g., Gavalik, supra, 812 F.2d at 851 ("Proof of incidental loss of benefits as a result of termination will

not constitute a violation of § 510 [29 U.S.C. § 1140]."); Corum v. Farm Credit Services, 628 F.Supp. 707, 718 (D.Minn. 1986) (plaintiff must show more than "lost opportunity to accrue additional benefits" to sustain a § 510 claim); and, Baker v. Kaiser Aluminum & Chem. Corp., 608 F.Supp. 1315, 1319 (N.D.Calif. 1984) ("The only evidence offered by plaintiff is that if he had not been terminated, he would have been able to accrue additional benefits.") As the Trial Court and the Court of Appeals determined, the Petitioners have failed to demonstrate that their employment at LTV Steel Mining Company was adversely affected in any substantial way so as to be in violation of 29 U.S.C. § 1140. For these reasons, the Petition for a Writ of Certiorari should be denied.

Conclusion

Although the Petitioners are clearly dissatisfied with the evidentiary record before this Court, that evidentiary record is of their own making and is an appropriate basis upon which the Trial Court originally granted summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). There were no genuine issues as to any material fact before the Trial Court and the Respondents were entitled to judgment as a matter of law. The Petitioners have failed to advance any legal authorities which would question the propriety of the decisions of the Trial Court and the

Court of Appeals below, nor have they demonstrated any Rule 10 basis upon which to secure review by certiorari. For these reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

HANFT, FRIDE, O'BRIEN,
HARRIES, SWELBAR &
BURNS, P.A.
Raymond L. Erickson*
Richard J. Leighton
Attorneys for Respondents
1000 First Bank Place
130 West Superior Street
Duluth, Minnesota 55802
(218) 722-4766

*Counsel of Record